LOAN DOCUMENT

PHOTOGRAPH THIS SHEET

TJAGSA

LEVEL

1

INVENTORY

DTIC ACCESSION NUMBER

Article 31(b): Who Should

DOCUMENT IDENTIFICATION

DISTRIBUTION STATEMENT A
Approved for Public Release
Distribution Unlimited

DISTRIBUTION STATEMENT

HANDLE WITH CARE

ACCESSION FOR
NTIS GRA&I ☐
DTIC TRAC ☑
UNANNOUNCED ☐
JUSTIFICATION

BY

DISTRIBUTION/

AVAILABILITY CODES

DISTRIBUTION	AVAILABILITY AND/OR SPECIAL	
A		

DISTRIBUTION STAMP

DATE ACCESSIONED

DATE RETURNED

20060707272

DATE RECEIVED IN DTIC

REGISTERED OR CERTIFIED NUMBER

PHOTOGRAPH THIS SHEET AND RETURN TO DTIC-FDAC

DTIC FORM 70A JUN 90

DOCUMENT PROCESSING SHEET

PREVIOUS EDITIONS MAY BE USED UNTIL STOCK IS EXHAUSTED.

LOAN DOCUMENT

ARTICLE 31(b): WHO SHOULD BE REQUIRED TO GIVE WARNINGS?

A Thesis

Presented to

The Judge Advocate General's School,
United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

by Captain Manuel E. F. Supervielle, JAGC
United States Army

36TH JUDGE ADVOCATE OFFICER GRADUATE COURSE

April 1988

ARTICLE 31(b): WHO SHOULD BE REQUIRED TO GIVE WARNINGS?

by Captain Manuel E. F. Supervielle

ABSTRACT: This thesis examines the historical origins and development of the right against self-incrimination, the common-law rule of confessions, and the due process voluntariness doctrine in the civilian community and in the military, to form a basis for evaluating the four tests devised by the Court of Military Appeals to answer the question of who should give Article 31(b) warnings. This thesis concludes that only those persons acting in an official military law enforcement capacity, regardless of the suspect's perception, should give Article 31(b) warnings. This Officiality test is the most faithful to the multiple policy objectives embodied in Article 31(b) and should be adopted.

TABLE OF CONTENTS

PART I

INTRODUCTION

> No person subject to this chapter may interrogate, or request any statement from an accused or person suspected of an offense without first informing him....[1]

Thus begins Article 31(b) of the Uniform Code of Military Justice. The words are not difficult to understand. The grammatical construction is not complex. Why then has there been so much debate and difference of opinion over this simple phrase? Who is supposed to be the subject of the command in the phrase? Who is or should be required to warn under Article 31(b)?

Military judges at all levels have wrestled with this issue since May 31, 1951, the effective date of Article 31. Even the Court of Military Appeals has found it difficult to reach a consensus on this question and maintain the consensus over time. In fact, since 1953 when the Court of Military Appeals first faced this issue in United States v. Wilson,[2] the judges on the court have devised four different tests to answer the question of who is required to warn under Article 31(b).[3] Some tests endured longer than others.

The test currently in force is the Duga officiality plus perception test.[4] As recently as 1987, however, Chief Judge Everett expressed reservations about the continued validity of the Duga test.[5] The analysis to Military Rule of Evidence 305(c) best summarizes the current confusion in this area of the law. It states in pertinent part that "Rule 305(c) basically requires that those persons who are required by statute to give Article 31(b) warnings give such warnings. The Rule refrains from specifying who must give such warnings in view of the unsettle nature of the case law in the area."[6]

The "unsettled nature of the case law in this area" leaves a great deal of maneuvering room for defense counsel to argue for the exclusion of an unwarned confession obtained in compliance with the Duga test. The trial counsel must be familiar with the reasoning and policy objectives of the Duga test, as well as other tests that may be advanced by a resourceful defense counsel, to persuasively argue for admission of the unwarned confession.

To properly answer the question of who must warn under Article 31(b), it is first necessary to understand how subsection (b) relates to the other sections of Article 31 and to the rules of military evidence. Subsection (b) is only one piece of a large, intricate blanket of protection that has been sewn together over centuries, using material from different sources. The blanket protects persons suspected or accused of a crime in the military, and at the same

time it protects the judicial process. Focusing exclusively on the issue who must warn without considering the other facets of Article 31 would be like holding the large blanket a few inches from your eyes and looking only at one section. This kind of examination would not yield an appreciation of how the entire blanket protects individuals and the judicial process. Thus, to fully appreciate the policy objectives underlying the different tests devised by the Court of Military Appeals for answering the central question of this article, an overview of the law is necessary. Only from such a vantage point can the complexity and purpose of the law be appreciated.

To provide the proper vantage point for analysis, part II of this article will examine the historical origins and development of the right against self-incrimination, the common-law rule of confessions, and the due process voluntariness doctrine. Part III will explore in detail the development of the same legal principles in the United States Army, and by 1950, all of the armed forces.[7] Part IV will discuss the four tests devised by the judges of the Court of Military Appeals to answer the central question of this article. Specifically, part IV will examine the rationale and policy objectives underlying each test, as well as the strengths and weaknesses of each test. In conclusion, I will answer the question of who should warn under Article 31(b).

PART II

DEVELOPMENT OF THE LAW OF CONFESSIONS IN ANGLO-AMERICAN JURISPRUDENCE TO THE YEAR 1951[8]

The law of confessions[9] consists of several rules, implementing separate policy objectives, used to decide the admissibility of an accused person's out-of-court confession. This part of the article will summarize the historical development of the right against self-incrimination,[10] the common-law rule of confessions, and the fourteenth amendment due process voluntariness doctrine. Together, these legal principles form the foundation of the law of confessions.

The right against self-incrimination and the common-law rule of confessions originated during different centuries and for different reasons. The right against self-incrimination originated during the sixteenth century in England. One of its primary objectives was to shield the accused person's thought process from governmental intrusion seeking incriminating information for use at a criminal proceeding.[11] The common-law rule of confessions originated in England during the eighteenth century. Its objective was to exclude untrustworthy out-of-court confessions.[12] The due process clause of the fourteenth amendment to the United States Constitution was incorporated into the American law of confessions

in the first half of 1900's. Its objective was to insure fairness in the criminal justice process.

Article 31 brought these different legal principles together for the first time. To fully understand Article 31, one must first understand the historical foundations for the creation and development of the principles that make up Article 31. In the words of Justice Frankfurter: "The ... [right] against self-incrimination is a specific provision of which it is peculiarly true that a page of history is worth a volume of logic."[13]

Section A: The Historical Development of the Right Against Self-Incrimination

Fifteenth-century England had three different systems for the administration of criminal law: the common-law system, the ecclesiastical legal system and the Star Chamber legal system.[14] The common-law system was accusatorial in nature; that is, the community accused an alleged wrongdoer of a crime, and then the state accused him by means of a grand jury indictment. Trial procedure consisted of in-court examination of witnesses and of the defendant. The types of crimes prosecuted were such offenses as larceny, robbery, assault, and other "common" offenses.[15]

The ecclesiastical courts and the Star Chamber proceeded in an inquisitorial manner. The

ecclesiastical courts tried to expose religious heretics, and the Star Chamber tried to uncover persons who held seditious beliefs.[16] In these courts, an official administered an oath ex officio[17] to the defendant and ordered him to

> tell the truth to the full extent of his knowledge as to all things he would be questioned about, without [being advised] ... whether or not he was accused ... or of the nature of the questions before administration of the oath.[18]

The oath ex officio compelled the defendant to incriminate himself if he held opinions that were offensive to the crown or Church. The compulsion resulted from the "choices" given to the defendant: he could refuse the order to talk, and be held in contempt of court; he could answer the questions truthfully, and incriminate himself; or he could lie under oath, and commit perjury.[19] This "cruel trilemma" left the defendant no real choice. The compulsion was legal in the sense that the order to testify came from a court.

During the next two centuries, the basic unfairness of the procedures employed by the Star Chamber and ecclesiastical courts led to growing opposition to the use of the oath ex officio.[20] By 1604, the first Parliament of James I presented the king a petition asking that the oath ex officio "whereby men are forced to accuse themselves, be more

sparingly used."[21] Opposition to the use of the oath ex officio in combination with an order to testify intensified. By 1641, Parliament abolished the Star Chamber and eliminated the criminal jurisdiction of the ecclesiastical courts. The use of the oath ex officio was abolished in the same year.[22] These reforms, however important, did not establish the right against self-incrimination.

> Defendants were usually not examined upon oath by the common law courts, but they were questioned freely about criminal activities and pressed by the judges to answer. Protests against such questioning were not raised until after the oath ex officio had been condemned because of its association with the [Star Chamber and ecclesiastical courts]. During the mid-seventeenth century, several cases recorded the growing opposition to the practice of the common law courts.... The old habit of questioning the accused [during common law criminal trials] did not completely die out, however, until the beginning of the eighteenth century.[23]

An important new legal principle known as the right against self-incrimination had taken root in England and in America. Following the American Revolutionary War, six states included the right against self-incrimination in their constitutions.[24] To insure that the newly-formed federal government could not commit political and religious persecutions

through the judicial process as in England, the proposed fifth amendment to the federal Constitution contained a clause prohibiting the federal government from compelling any person to be a witness against himself in any criminal case.[25]

The requisite number of states ratified the Bill of Rights containing the fifth amendment's right against self-incrimination in 1791.[26] During the first century of its existence, however, the Supreme Court limited the application of the fifth amendment to federal criminal trial proceedings.[27] Thus, state criminal proceedings were not affected by the fifth amendment right against self-incrimination. Furthermore, even in federal criminal proceedings, the common-law rule of confessions exclusively governed the admissibility of extra-judicial, or out-of-court confessions.[28] Consequently, the right against self-incrimination protected only witnesses, including the accused if he testified, during a federal criminal proceedings. The trial judge implemented the right against self-incrimination by informing the witness of his right to refuse to answer a question. The judge, however, cautioned the witness that he could refuse to answer the question only if the response was incriminating or if it might lead to incriminating information.[29]

Confessions, on the other hand, were dealt with in both state and federal courts under the common-law rule of confessions.[30] The Supreme Court specifically adopted the common-law rule in 1884.[31] In 1897,

however, the Supreme Court decided Bram v. United States.[32] Bram announced a radical departure from previous precedent when it declared that

> [i]n criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person "shall be compelled in any criminal case to be a witness against himself.[33]

Bram interjected the fifth amendment's right against self-incrimination into a totally new area: the body of law concerned with the admissibility of confessions. Although this was a novel legal concept, its practical significance was limited by two circumstances. First, Bram was a federal criminal case and thus had no impact on state confession law.[34] Second, "while the language [of Bram] was never expressly disavowed in subsequent cases arising in the federal courts the [Supreme] Court seems nevertheless to have proceeded along due process standards rather than the self-incrimination analysis."[35] The Supreme Court de-emphasized Bram, citing it with approval in only a few cases.[36] Bram faded in significance until 1966 when the Supreme Court cited it as supporting authority for its landmark decision in Miranda v. Arizona.[37] Since this part of the article traces the development of the right against self-incrimination

until 1951, the relevance of Miranda on the central issue of who must warn under Article 31(b), will be discussed in part IV. Since Miranda was decided in 1966, in 1951 the fifth amendment's right against self-incrimination in civilian jurisprudence was limited to federal criminal trials, and it protected only witnesses during the trial.[38]

Section B: The Historical Development of The Common-Law Rule of Confessions and The Due Process Voluntariness Doctrine

Professor John H. Wigmore identified four stages in the development of the law of confessions.[39] These stages will be used as the framework for analysis in this section.[40]

The first stage in the development of the law of confessions occurred during the sixteenth and seventeenth centuries. No rule or practice existed for excluding confessions from admission at a criminal trial. Judges admitted all statements made by a defendant. Torture, threats, promises,and other means of coercion were routinely used to obtain a confession for use at trial against the defendant.[41]

The second stage in the development of the law of confessions began in the second half of the 1700's.[42] The practice of criminal law in the common-law courts improved gradually with the passage of time and a new

rule concerning the use of confessions emerged. Judges recognized that a confession, "as an extrajudicial statement, ... would ordinarily be obnoxious to the hearsay [exclusionary] rule."[43] Therefore, the confession should not be admitted into evidence unless there existed an independent indicia of trustworthiness. If there was such an indicia, the confession could be excepted from the exclusionary provision of the hearsay rule. Judges concluded that a confession was in effect an admission against interest by a party to the proceedings, one of the recognized hearsay exceptions. Thus, the admission against interest by the defendant provided the necessary indicia of trustworthiness allowing the confession to escape the exclusionary provision of the hearsay rule.[44] This new rule become known as the common-law rule of confessions. It is important not to confuse this rule with the broader and more general law of confessions. At this point in history, the common-law rule of confessions was the exclusive component of what would grow to be the law of confessions.

What if torture, threats, or promises negated the necessary indicia of trustworthiness? The new common-law rule of confessions excluded the confession if such means had been used to obtain it. The judges reasoned that the use of coercion, threats, and promises discredited the confession.[45] Judges wanted to admit only reliable and trustworthy confessions. The rule was intended to protect the fact-finding process. Any benefit to the defendant resulting from the exclusion of his confession was incidental.

During the initial period of the common-law rule's development, very few confessions were excluded.[46] The defendant had the near impossible burden of showing that he was subjected to serious coercion, resulting in an untrustworthy confession. "At this stage, then, the doctrine ... [was] a perfectly rationale one. Confessions apparently untrustworthy as affirmation of guilt are excluded."[47]

The third stage of the law of confessions occurred from the beginning of the 1800's to the latter part of the same century.[48] The attitude of the judges gradually turned 180 degrees and reached a point where confessions were very difficult to admit into evidence. Judges held a very strong prejudice against the use of confessions at trial. Professor Wigmore gives three reasons for the shift in opinion by nineteenth century judges.[49]

First, most criminal defendants were from the lowest echelons of society. Defendants were usually poor people with little or no education. They had been conditioned generation after generation to be subservient to social superiors and government officials. Judges believed these types of defendants were very susceptible to undue influence from persons in authority. Thus the defendant might confess falsely if he felt pressured to do so.[50]

The second reason for the prejudice against admissibility of confessions was that evidentiary

issues often had to be decided by isolated judges without the benefit of consultation with colleagues. "The result was that judges commonly preferred to eliminate the questionable evidence altogether, [including confessions] ... and to solve all questions that were even arguable ... in favor of the accused."[51]

The third reason was that judges believed the rules of procedure at common-law were fundamentally unfair to the defendant. Specifically, the defendant could not testify under oath at his own trial because he was considered an incompetent witness.[52] The common-law considered the defendant incompetent because he was an interested party in the proceedings, and as such, he might have a propensity to testify falsely. Many judges refused to admit the confession as a way to balance the scales of justice between the individual and the government. Fairness required that if the defendant could not testify, then his confession should not be admitted.

The three reasons for nineteenth century judge's prejudice against confessions were legitimate. The problem was that the courts continued to articulate the traditional common-law rule of testing confessions for trustworthiness as the legal foundation for their decisions, when in fact their decisions were based on the totally different policy concerns mentioned above. "Hence an irreconcilable conflict between the normal and accepted theory or principle for excluding confessions, and the abnormal use practically made of it for ulterior purposes [developed]."[53] Many

decisions seemed absurd unless the ulterior motives behind it were understood. Judges declared confessions to be untrustworthy upon the slightest excuse, no matter how preposterous the rationale.[54]

By the latter part of the 1800's, the fourth stage in the development of the law of confessions began.[55] Advances in criminal procedures such as granting the defendant the right to testify, reduced the significance of the ulterior justifications for excluding confessions. The courts were returning to the original purpose of the common-law rule of confessions: the concern with trustworthiness. The law of confessions turned another 180 degrees, back to where it was at the beginning of the 1800's.[56]

In 1884 the Supreme Court adopted the traditional common-law rule of confessions in Hopt v. Utah.[57] This was the Court's first decision concerning the admission of a confession. It declared that

> the presumption upon which weight is given to such evidence ... ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his

confession voluntary within the meaning of the law.[58]

The Court excluded the confession on the traditional policy that under certain circumstances, involuntarily obtained confessions were nothing more than untrustworthy hearsay.

The exclusive use of this policy for determining the admissibility of confessions was challenged in 1897 when the Supreme Court decided Bram v United States.[59] There, for the first time, the Court interjected fifth amendment right against self-incrimination concerns into the equation for testing the admissibility of confessions. Bram, however, did not have a significant impact on the federal law of confessions, and no impact on the law of confessions in state jurisdictions.[60]

Legal scholars voiced other challenges to the exclusive use of the traditional common-law rule during the first half of the 1900's.[61] Professor Charles T. McCormick recognized the validity of the traditional common-law confessions rule, but he also saw the need for excluding confessions to support the policy that law enforcement officials should treat suspected and accused persons in a humane and dignified manner. He believed the use of torture, intimidation, and other "third degree" police tactics corrupted the judicial process and was fundamentally unfair to the defendant. Professor McCormick argued that the trustworthiness of a confession should not be the only issue in determining admissibility.[62]

In 1936 the Supreme Court adopted the policy of fundamental fairness as part of the law of confessions in Brown v. Mississippi.[63] This was the Court's first case dealing with the admissibility of a confession arising from a state court. In Brown, brutal torture was used to obtain the confession admitted in evidence against the defendant. After the murder of a white farmer in rural Mississippi, police officers suspected a poor black man named Brown as the killer. Police officers arrested Brown and pretended to lynch him twice in an attempt to induce a confession, but Brown refused to confess. He was released, but two days later he was rearrested and whipped with ropes and studded belts until he confessed to the murder.[64]

The Supreme Court drew a distinction between the right against self-incrimination and the right to due process. The Court found only the latter to have been violated and concluded that

> the question of the right of the State to withdraw the privilege against self-incrimination is not here involved....The compulsion to which the quoted statements refer is that of the processes of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter.

> It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of this petitioner, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.[65]

The Supreme Court did not apply the Bram rule for two reasons. First, the Bram rule applied only to federal trials and Brown was a state trial. Second, despite the Bram rule, the Supreme Court in 1936 viewed the right against self-incrimination as a protection available only during the trial itself, not before.

The significance of Brown was that it created a fourteenth amendment due process protection and that it applied the protection to state criminal proceedings. Following Brown, the Supreme Court, on occasion, used the due process clause of the fourteenth amendment to exclude confessions obtained by methods that were fundamentally unfair to the defendant. For example, in 1940, Chambers v. Florida[66] recognized that mental coercion, not just physical torture, could be so extreme as to violate due process. There, the police arrested the accused without a warrant, held him incommunicado, and subjected him to continuous interrogation for five days.

In 1941, Lisenba v. California[67] clearly distinguished the traditional common-law rule of confessions and its objective of excluding only

unreliable confessions, from the due process requirement of the fourteenth amendment and its objective of insuring fundamental fairness.

> The aim of the [common-law] rule that a confession is admissible unless it was voluntarily made is to exclude false evidence.... The aim of the requirement of due process is not to exclude presumptively false evidence but to prevent fundamental unfairness in the use of evidence, whether true or false.[68]

"Over the next several years [after Lisenba], while the Justices continued to use the terminology of voluntariness, the Court accepted at different times both the concepts of trustworthiness and of constitutional fairness."[69]

Brown, Chambers, Lisenba, and other important decisions[70] relied primarily on the fourteenth amendment due process voluntariness standard rather than the traditional common-law trustworthiness rule of confessions. By 1951, when the Uniform Code of Military Justice became effective, the American law of confessions required that a confession be voluntarily obtained before it could be admitted for two totally different policy reasons: due process fundamental fairness and common-law trustworthiness.[71]

On the narrower topic of rights warnings, state and federal law differed in one major way in 1951. In

state criminal cases, warnings by law enforcement officers concerning the right against self-incrimination played a small role in the law. Warnings were a factor, among many others, to be considered under the totality of the circumstances as part of the due process voluntariness doctrine.[72] The Supreme Court did not require the application of the fifth amendment's right against self-incrimination protection to state proceedings.

In federal criminal cases, Congress required prompt arraignment before a federal magistrate for persons arrested by federal law enforcement officials.[73] Under Federal Rule of Criminal Procedure 5(b), the magistrate had a duty to warn the suspect of the charge against him, that he had the right to remain silent, that if he chose to say something it could be used against him at trial and that he had the right to the assistance of a lawyer.[74]

In order to make this rule effective, the Supreme Court decided in McNabb v. United States[75] that if the government unnecessarily delayed the arraignment of the accused, a resulting confession would be inadmissible. Lower federal courts initially interpreted the McNabb decision as part of the due process voluntariness doctrine and accordingly treated an unnecessary delay in arraignment as a factor to be considered under the totality of the circumstances in determining the voluntariness of the decision to confess.[76] The Supreme Court expressly rejected this interpretation just five years after McNabb in Upshaw v. United

States,[77] when it proclaimed that if the government unnecessarily delayed the accused's arraignment, the confession was per se inadmissible. The Court reasoned that Congress granted the accused a right to be promptly warned of his constitutional right against self-incrimination, therefore the voluntariness of the confession was not a relevant matter in this inquiry. The totality of the circumstances test was not reached unless the government could first show that it had arraigned the accused promptly. Consequently, federal law enforcement officials had to overcome the McNabb prompt arraignment hurdle, the due process voluntariness hurdle,[78] and the traditional common-law trustworthiness hurdle, to admit a confession.

Since the McNabb rule was a means to enforce the Federal Rules of Criminal Procedure, it did not apply to the states. Furthermore, since the Court promulgated this rule pursuant to its supervisory power over lower article III federal courts, it did not apply to courts-martial because the Supreme Court did not have any supervisory power over military tribunals.[79]

In summary, by 1951, the American civilian law of confessions rested primarily on the due process voluntariness doctrine. The traditional common-law rule of confessions was still a part of the larger law of confessions, but it was no longer the only consideration. The right against self-incrimination was applicable only in the court room, and only to the extent the trial judge believed a particular question might evoke an incriminating response. Outside the

courtroom, federal law enforcement officials had to arraign the accused promptly, at which time the accused was warned of his right against self-incrimination, but state law enforcement officials had no duty to arraign promptly or warn.

PART III

DEVELOPMENT OF THE RIGHT AGAINST SELF-INCRIMINATION AND THE DUTY TO WARN IN THE MILITARY TO THE YEAR 1951

Part III will review the development of the right against self-incrimination in the United States Army and by 1951, all the armed forces, with a focus on the creation and evolution of the warning requirement. The time period covered is from the first American Articles of War of 1775 to the Uniform Code of Military Justice of 1951. Five stages in the development of the right against self-incrimination are important in the discussion: 1) Pre-recognition, 2) Recognition, 3) Early Development, 4) Independent Respect and 5) Expansion.

Section A: Pre-recognition of the Right 1775 to 1806

The Articles of War of 1775 were the first enactment of American military law.[80] They were copied from the British Articles of War in effect in 1775, which in turn were based on the continental European civil law.[81] Interestingly, the Anglo common law did not have a strong influence on British military law. As a result,

> our [American] military law has always borne many striking resemblances to the civil law, as contrasted with the Anglo-American common law. Over the years, many rules and practices [were] brought over from the common law, such as the presumption of innocence, the privilege against self-incrimination, and the common-law rules of evidence.[82]

The 1775 Articles of War contained no reference to the right against self-incrimination, and no provision for the use of common-law rules of evidence. The 1775 Articles truly reflected the mark of the civil-law inquisitorial legal system. In 1776, the Continental Congress revised the Articles of War and expressly rejected the right against self-incrimination. Section XIV, Article 6, of the 1776 Articles of War, authorized compulsory testimony, declaring that "[a]ll persons called to give evidence, in any cause, before a court-martial, who shall refuse to give evidence, shall be

punished for such refusal at the discretion of such court-martial."[83]

The accused ordered to testify before a court-martial was truly compelled to incriminate himself if he was in fact guilty. The combination of an oath and a lawful order to testify, placed the accused in the same "cruel trilemma" that Englishmen faced prior to the abolition of the oath ex officio in 1641. Thus, the first two enactments of law for the discipline of the American army created an inquisitorial criminal system of law.

Section B: Recognition of the Right, 1806

Article 69 of the 1806 revision of the Articles of War recognized the right against self incrimination for the first time in American military law.[84] It stated in pertinent part that

> [t]he judge advocate or some person deputed by him, ... shall prosecute in the name of the United States of America; but shall so far consider himself as counsel for the prisoner, after the said prisoner shall have made his plea, as to object to any leading question, to any of the witnesses, or any question to the prisoner, the answer to which might tend to criminate himself....[85]

The authorization for compulsory testimony contained in the 1776 Articles was eliminated. In its place, stood the first statutory recognition of the right against self-incrimination in the American military. The prosecuting judge advocate was responsible for ensuring respect for the right against self-incrimination held by the prisoner or accused.[86] Non-accused witnesses did not enjoy the protection of the right, since the judge advocate only had to object to incriminating questions put to the accused. The judge advocate acted as "counsel for the prisoner", not as counsel for all witnesses.[87] The 1806 Articles of War selectively incorporated one of the most fundamental rights of Anglo-American jurisprudence: the right against self-incrimination. It was recognized, however, only at the court-martial. There was no statutory recognition of the right at preliminary hearings or investigations.[88]

Section C: Early Development of the Right 1806 to 1916

Subsection 1: Act of 1878

The Act of March 16, 1878,[89] granted an accused the right to testify at his court-martial if he chose to, but he could not be ordered to testify. This statutory change reflected the trend in the common-law rules of evidence of admitting more evidence by relaxing the competency requirements. The statute reinforced the right against self-incrimination by

declaring that the accused's "failure to make such request [to testify] shall not create any presumption against him."[90] This provision strengthening the right against self-incrimination reflected the position taken by the Supreme Court in Wilson v. United States.[91] In Wilson, the Supreme Court established the rule that the government cannot adversely comment on the accused's refusal to testify at trial.[92] The accused's refusal to testify was based on the fifth amendment right against self-incrimination, and if the government was permitted to adversely comment on the accused's invocation of his right, the constitutional protection would be effectively nullified.

Subsection 2: Instructions for Courts-Martial, 1891

The 1891 Instructions for Courts-Martial[93] provided the first comprehensive procedural guide for the conduct of courts-martial. The Instructions reinforced the right against self-incrimination by reiterating the statutory duty of the judge advocate to object to incriminating questions put to the accused.[94]

The Instructions, however, went further than the statutory minimum requirement. In describing additional duties of the judge advocate, the Instructions required him to observe a limited portion of the common-law rule of confessions. The Instructions stated that the judge advocate

> may ask a prisoner how he intends to plead; but, when the accused is an enlisted man, he should, in no case, try to induce him to plead guilty, or leave him to infer that, if he does so, his punishment will be lighter. When, however, such a plea is voluntarily and intelligently made, the judge advocate should properly advise the prisoner of his right to offer evidence in explanation of his offense....[95]

The plea of guilty was a judicial confession. The Instructions warned the judge advocate not to induce the enlisted accused to plead guilty.[96] The Instructions also admonished the judge advocate not to say or do anything which might make the enlisted accused think he would receive a benefit from pleading guilty. Application of both the constitutional right against self-incrimination and the limited portion of the common-law rule of confessions, however, was confined to the courtroom.[97]

The Instructions also required the judicial confession be made voluntarily and intelligently. This requirement demonstrates an early concern in the Army for ensuring the accused not only pled guilty of his own free will, but also a concern for ensuring the accused understood the consequences of his actions.

Subsection 3: Act of 1901

The Act of March 2, 1901,[98] contained the next specific statutory reference to the right against self-incrimination in the Army. This statute allowed the Army to compel "attendance of civilian witnesses at courts-martial by certifying the witness' refusal to appear or testify to a federal district court for trial of the issue."[99] To protect civilian witnesses from possible abuse by courts-martial, the act included the following proviso: "no witness shall be compelled to incriminate himself or to answer any question which may tend to incriminate or degrade him."[100] Civilian witnesses were thus assured of the right against self-incrimination at courts-martial. They were also given a non-constitutionally based protection against degrading questions.[101]

The fact that this statute pertained only to civilian witnesses created some doubt about the applicability of the Act's proviso on self-incrimination to Army witnesses. This doubt about the status of non-accused Army witnesses was an important factor in triggering the "Independent Respect" stage of development.[102]

Subsection 4: Manual for Courts-Martial, 1905

The 1905 Army Manual for Courts-Martial[103] tried to resolve the confusion regarding who was entitled to the protection of the right against self-incrimination by reiterating the language of the proviso in the Act of 1901, and omitting any language that implied the proviso pertained only to civilian witnesses. The Manual simply stated that "no witness shall be compelled to incriminate himself or to answer any questions which may tend to incriminate or degrade him."[104] Unfortunately, this phrase did not settle the issue because immediately following this language, there was a footnote to the Act of 1901, which was the source of the confusion in the first place.

Of greater importance, the 1905 Manual purported to make a wholesale adoption of the common-law rules of evidence. The duty of the judge advocate not to induce an enlisted man to plead guilty was retained, but the discussion about voluntary and intelligent pleas was deleted.[105] To fill the void left by the deleted provision, a new section entitled "Examination of Witnesses" was added. It stated that

> [c]ourts-martial follow in general, so far as ...[possible], the common-law rules of evidence as observed by the United States courts in criminal cases, but they are not required by statute to do so, and a certain latitude in the introduction of evidence and

> the examination of witnesses, by an avoidance of technical and restrictive rules, is permissible when it is in the interest of the administration of military justice...."[106]

This was a significant change from the 1891 Instructions for Courts-Martial, which selectively incorporated a very limited portion of the common-law rules of evidence. The common-law rules of evidence in force in federal courts, including the rules pertaining to confessions, would now be applicable at courts-martial, unless their application was not in the interest of the administration of military justice. This meant that confessions, not just pleas of guilty, had to be voluntary to be admissible, unless there was some other indication of reliability. The 1905 Manual retained, however, the different rules for enlisted and officer concerning judicial confessions.[107]

In summary, the highlights of the Early Development stage were as follows: The Act of 1878 strengthened the accused's right against self-incrimination at courts-martial by forbidding adverse comment on the exercise of the right. The 1891 Instructions for Courts-Martial reiterated the right against self-incrimination and adopted a limited portion of the common-law rule of confessions regarding judicial confessions of enlisted accused. The Instructions also required the accused's plea of guilty to be voluntary and intelligent. The Act of 1901 assured civilian witnesses the right against self-incrimination at courts-martial, but led to uncertainty

concerning the applicability of the right against self-incrimination to Army witnesses at courts-martial. The 1905 Manual for Courts-Martial unsuccessfully attempted to clarify this uncertainty, but more importantly, the Manual adopted the common-law rules of evidence wholesale. The common-law rules of evidence, however, could be avoided in the interest of "military justice."

Section D: Independent Respect for the Right 1916 to 1917

Subsection 1: Act of 1916

The Act of August 29, 1916,[108] established the 1916 Articles of War. This was the first attempt to make large-scale, significant revisions to the Articles of War, which had been basically unchanged since the Revolutionary War. The 1916 Articles of War contained a new article entitled "Compulsory Self-Incrimination Prohibited," Article 24:

> No witness before a military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, shall be compelled to incriminate himself or to answer

any questions which may tend to incriminate or degrade him.[109]

General Crowder, The Judge Advocate General, testified before Congress that Article 24 extended the protection against self-incrimination to all witnesses at all formal hearings, not just those compelled to testify pursuant to the Act of 1901.[110] Thus, Article 24 made it clear that the protection against self-incrimination was of general application to all witnesses at courts-martial and other quasi-judicial hearings in the army.

Why was the right against self-incrimination extended beyond the court-martial? To answer this question, the concept of "compulsion," as discussed in part II above, must be kept in mind. Compulsion resulted from placing a witness under oath and ordering him to testify. Quasi-judicial hearings had the authority to compel a witness in the same manner as a court-martial,[111] thus, it was logical to expand the right against self-incrimination to such hearings.

Subsection 2: Manual for Courts-Martial, 1917

The 1917 Manual for Courts-Martial[112] also gave independent respect to the right against self-incrimination. Paragraph 233 of the Manual was entitled "Compulsory Self-Crimination Prohibited." It stated that the "Fifth Amendment [right against self-

incrimination] applies to trials by courts-martial and is not limited to the person on trial, but extends to any person who may be called as a witness."[113] This laid to rest any doubt about the applicability of the right against self-incrimination to military witnesses.

The 1917 Manual also contained a discussion of the common-law rule of confessions. Paragraph 225, entitled "Confessions," declared that "[a]nother exception to the rule excluding hearsay evidence is the rule that admits testimony as to confessions of guilt made by the accused."[114] Paragraph 225 required the confession to be entirely voluntary[115] before it could be admitted, explicitly stating that "the reason for the rule is that where the confession is not thus voluntary there is always ground to doubt whether it be true."[116] This unequivocal declaration of policy left no doubt that in the Army in 1917, as in civilian jurisdictions, the common-law rule of confessions, concerned with trustworthiness of the confession, as measured by the degree of voluntariness in obtaining the confession, was the only law applicable to admissibility of confessions. The constitutional right against self-incrimination was not a factor in the admissibility of confessions, nor was the due process standard.

Significantly, paragraph 225 officially recognized, for the first time, that military rank could influence an accused to make a confession. Paragraph 225 stated that "[in] military cases, in view of the authority and <u>influence</u> of superior rank,

confessions made by ... [persons of inferior rank], especially when [they are] ignorant or inexperienced," were generally suspect.[117] The 1917 Manual categorized confessions made by persons of inferior rank to a superior into three groups. The government had to meet a different burden of proof for each to admit the confession:

1. When the accused is "held in confinement or close arrest, ... [the confession] should be regarded as incompetent unless very clearly shown not to have been unduly influenced."[118]

2. When the accused is under charges, if there is "even a slight assurance of relief or benefit [made] by such superior ... [the confession] should not in general be admitted."[119]

3. When there is no showing that the confession was "made under the influence of promises or threats, etc., ... [the confession] should, yet, in view of the military relations of the parties, be received with caution."[120]

After identifying these potential sources of involuntary confessions, the drafters of the Manual recognized a new tool that was evolving in the investigatory arena to reduce the potential for involuntary, and thus untrustworthy confessions. Paragraph 225 indicated a preference for the use of preliminary warning to be given during investigations:

> Considering, however, the relation that exists between officers and enlisted men and between an investigating officer and a person whose conduct is being investigated, and the obligation devolving upon an investigating officer to warn the person investigated that he need not answer any question that might tend to incriminate him, confessions made by soldiers to officers or by persons under investigation to investigating officers should not be received unless it is shown that the accused was warned that his confession might be used against him or it is shown clearly in some other manner that the confession was entirely voluntary.[121]

The drafters of the Manual noted that an obligation to warn was devolving upon investigators, but apparently was not yet a clear obligation. This paragraph implied that if a warning was given, the resulting confession should be presumed to be voluntary, and thus untrustworthy. If the warning was not given, then an affirmative showing of voluntariness should be required before the confession could be admitted. The warning was only a preferred practice, not a requirement.

Even though the warning was substantively about the constitutional right against self-incrimination, the preference for the warning was based on the common-law rule of confessions, and its concern for trustworthiness of confessions. The intent was to

protect the fact-finding process, not the accused. Any benefit to the accused was incidental. The source of involuntariness, and thus the target that the warning was supposed to destroy, was the influence generated by rank and duty position in the Army. Therefore, the original policy objective behind the obligation to warn was to reduce the influence caused by the pressures of rank in the Army, and thus reduce the probability of unreliable confessions.

The Independent Respect stage was an important period in the development of the right against self-incrimination. Article of War 24 gave the right against self-incrimination independent recognition, and expanded the intended beneficiaries of the right to include non-accused military witnesses. Article 24 also extended the coverage of the right from courts-martial to quasi-judicial hearings. The 1917 Manual for Courts-Martial gave independent recognition to the right and recognized the influence of military rank and duty position of an Army investigator as potential sources of involuntary confessions. The 1917 Manual also articulated a preference for the use of preliminary warnings during investigations to counter-act the effects of improper influence caused by military rank and duty position.

It is important to understand that during this period of time references to the "voluntariness" of a confession dealt only with the common-law policy of trustworthiness of the confession, not with due process fairness to the accused.

Section E: Expansion of the Right 1917 to 1951

There were three legislative expansions of the right against self-incrimination following the enactment of Article of War 24 in 1916. At the same time, the common-law rule of confessions as applied in the Army, continued to expand, as did the warning requirement.

Subsection 1: Act of 1920

The first expansion of the right against self-incrimination in the Army was the Act of June 4, 1920, which established the 1920 Articles of War.[122] This Act added the words "officer conducting any investigation" to the list of forums mentioned in Article of War 24 where a witness could not be compelled to incriminate himself.[123] An officer designated to conduct an investigation now had to respect the witness' right against self-incrimination. Was this a "minor revision"[124] or was it a significant step in the evolution of the right in the Army? A review of the probable reason for the addition of the words supports the latter conclusion.

The exact reason for this revision is not clear, however, the expansion of Article of War 114 in 1916

may provide the answer. Article 114 authorized certain persons to administer oaths. Until 1916, only persons directly involved with courts-martial or quasi-judicial hearings were authorized to administer oaths. Article 114 expanded the authority to allow "any officer detailed to conduct an investigation, ..." the power to administer oaths.[125] Officers "detailed to conduct an investigation" could now legally compel testimony in the same manner as courts-martial and quasi-judicial hearings. Logically, therefore, a witness called before an officer detailed to conduct an investigation, should be afforded the same protection that he would enjoy at the traditional criminal forums.

Although the change to Article 114 was made in 1916, it appears that it took until 1920 to reconcile Article 24 with Article 114. The point to appreciate is that this seemingly minor change to Article of War 24 significantly expanded the boundaries restricting the right against self-incrimination beyond formal hearings to informal investigations.

Subsection 2: Manual for Courts-Martial, 1921

The 1921 Manual for Courts-Martial[126] made a change with respect to rights warnings. The obligation to warn first announced in the 1917 Manual was expanded, but it remained a part of the common-law rule of confessions, concerned with the trustworthiness of confessions. The expansions and clarifications were

threefold.[127] First, in the 1917 Manual, the obligation to warn an accused was devolving; in the 1921 Manual, the obligation had devolved upon investigators, ie. the 1921 firmly established the obligation to warn. Second, the 1917 Manual asked investigating officers to give the warnings; the 1921 Manual required investigating officers and on other military superiors to give the warnings. Finally, the 1917 Manual made no reference to civilian law enforcement officials having to warn; the 1921 Manual specifically stated that civilian police were under no obligation to warn under Article of War 24.

Subsection 3: The Elston Act of 1948

The second legislative expansion of Article of War 24 occurred in 1948, with the enactment of the Elston Act.[128] The Act added a second paragraph to Article 24:

> The use of coercion or unlawful influence in any manner whatsoever by any person to obtain any statement, admission or confession from any accused person or witness, shall be deemed to be conduct to the prejudice of good order and military discipline, and no such statement, admission or confession shall be received in evidence by any court-martial. It shall be the duty of any person in

> obtaining any statement from an accused to advise him that he does not have to make any statement at all regarding the offense of which he is accused or being investigated, that any statement by the accused may be used as evidence against him in a trial by court-martial.[129]

One writer believed the amendment contained three significant points.[130] First, it adopted by statute the common-law exclusionary rule already found in the law of confessions. It adopted a warning requirement for the first time in federal statute. Finally, it made the use of coercion or unlawful influence to obtain a statement a criminal offense. Was this the full extent of the importance of the amendment? Did the amendment merely adopt by statute the common-law exclusionary rule already found in the law of confessions? What was the significance of statutorily requiring warnings? I believe the Elston Act radically changed the law of confessions as applied in the Army, accomplishing much more than the three points listed above.

Under the common-law exclusionary rule, judges measured the amount of coercion used to determine if an untrustworthy confession may have been given. The judges could admit the confession if some coercion, but not too much was used. If the government proved that the confession was in fact accurate, despite the use of a great deal of coercion to obtain it, the exclusionary provision of the common-law rule could be avoided. The

exclusive policy underlying the common-law rule was to admit only reliable confessions.

The amendment to Article of War 24, on the other hand, required exclusion if coercion was used in "any manner whatsoever." The amendment drew a bright line for judges to observe. Judges could no longer balance the amount of coercion to decide if the statement was reliable. Once the line was crossed, the statement was inadmissible. Trustworthiness of the confession was not the underlying policy behind this new rule. The true policy was to provide the means by which to enforce respect for the right against self-incrimination outside of the courtroom. The amendment to Article of War 24 represented a radical change in the law.

Why did Congress take such a bold step in the area of self-incrimination? It realized that Article 24 needed "teeth" to make it enforceable. The "teeth" appeared in the provisions requiring automatic exclusion of evidence and criminal liability on the questioner, if coercion was used in any manner whatsoever. Congress knew the amendment was a drastic measures, but believed it was necessary to prevent the violation of the right against self-incrimination through the use of coercion and unlawful influence during pre-hearing investigations. Testifying in 1947 before the House Subcommittee on the Armed Services, General Hoover, The Judge Advocate General, said that the amendment to Article 24 made it a criminal offense for investigators to exercise coercion. Representative

Clason expressed his concern over creating potential criminal liability for investigators:

> Mr. Clason: That is going to put ... [the investigator] kind of in a hole, isn't it?
>
> General Hoover: Well, we want him to be in somewhat of a hole on it, because we think it is a protection to the accused persons that they are entitled to.
>
> Mr. Clason: I don't know....I think that is going to be a pretty stiff proposition.[131]

As to the legal basis for this amendment, there is no doubt that the right against self-incrimination, embodied in the fifth amendment to the Constitution, served as the foundation. Representative Elston summarized the amendment to Article 24 by saying to General Hoover "[y]ou are giving to accused persons in a court-martial trial the same protection he gets under the Constitution in a civil trial."[132] General Hoover concurred by stating, "[t]hat is right, and we are putting some teeth in it."[133] Congress thus specifically recognized that the constitutionally based right against self-incrimination could be violated not just through the use of compulsion at formal hearings, but also through the use of coercion and unlawful influence during pre-hearing investigations. The importance of placing this concept in a statute cannot be overemphasized. The amendment clearly accomplished

more than merely adopting the existing common-law rule of confessions.

Although the right against self-incrimination was recognized as the new legal foundation for preventing coercion and unlawful influence at any stage of the criminal investigative process, the first paragraph of Article 24 was not modified to harmonize with the amendment. Thus under the first paragraph of Article of War 24 the violation of the right against self-incrimination through the use of compulsion was still limited to the judicial forum, quasi-judicial forums, and designated investigating officers.

There was another difference between the common-law rule of confessions and the amendment, indicating the greater scope of the latter. The common-law rule applied only to confessions. Admissions, which were circumstantially rather than directly incriminating statements, were not within the coverage of the common-law rule of confessions.[134] The amendment, however, eliminated the artificial distinction between these types of pre-trial incriminating statements by the accused, making them both inadmissible if coercion or unlawful influence was used.

Finally, the common-law rule was concerned only with coercion. Coercion is the application of overt force, either physical, mental, or both, of which the subject is aware. Coercion is used to create discomfort on a subject. To stop the discomfort, the subject must do what the person applying the coercion

wants. The amendment recognized for the first time in a statute what had been recognized since the 1917 Manual, Paragraph 225, that in the military there are subtle and not so subtle pressures resulting from differences in rank and duty position.

This pressure may be so subtle that the subject may not even be conscious of it or that he is responding to it. The person causing the pressure may likewise be unaware that he is causing such pressure. Nonetheless, the effect is the same: the will of the subject is overcome, and he confesses although he would rather not. Congress recognized this phenomenon particular to the military and tried to curtail it. Congress created a catch-phrase for the subtle pressure: unlawful influence.

The curtailment of unlawful influence was a major goal of the Elston Act. The Act added Article 88 to the Articles of War to prohibit unlawful command influence over the actions of a court-martial. Article 88 was a center-piece of the Elston Act. I believe the inclusion of the words "unlawful influence" in the amendment to Article 24 reflected the overriding concern of Congress immediately after World War II with reducing the negative effect of rank superiority in the army's criminal justice process.

In summary, the Elston Act's amendment to Article 24 did not adopt the existing common-law exclusionary rule of the law of confessions; it created a new legal principle that the soldier was entitled to effective

enforcement of his right against self-incrimination during pre-trial investigations.

The amendment adopted a warning requirement for the first time in federal statute. But how was it different, if at all, from the pre-existing obligation to warn under paragraph 225 of the 1921 Manual? Under the amendment to Article 24, failure to warn did not automatically result in exclusion of the confessions, as did the use of coercion and unlawful influence. Furthermore, failure to warn was not expressly made a criminal offense, as was the use of coercion and unlawful influence.

What was the practical consequence of making the duty to warn statutory? Before the amendment, warnings were preferred, but not required. Failure to warn created a rebuttable presumption that the confession was involuntarily obtained and thus it was unreliable. The government could dispel the presumption by showing that no coercion or unlawful influence was used to obtain the confession. The government only had to show the unwarned confession was "otherwise voluntary."

Paragraph 136(b) of the Manual for Courts-Martial, 1949, interpreted the Elston Act amendment's requirement for warning as follows:

> If the confession or admission was obtained from the accused in the course of an investigation, by informal interrogation or by any similar means, it may not be received

> in evidence unless it appears that the accused, through preliminary warning or otherwise was aware of his right not to make any statement regarding an offense of which he was accused or concerning which he was being interrogated and understood that any statement made by him might be used as evidence against him in a trial by court-martial.[135]

Thus, when the accused had not been advised of his rights, the government could still escape the exclusionary rule if it could show the accused was otherwise aware of his right to remain silent and of the consequences of not remaining silent. The burden of showing that an accused was "otherwise aware of his right to remain silent" is drastically different from the burden of showing that the confession was "otherwise voluntary."

The critical difference concerning the duty to warn between the 1921 Manual and the Elston Act amendment, as implemented by the 1949 Manual, is as follows: under the 1921 Manual, warnings were exclusively a part of the common-law of confessions, concerned with the trustworthiness of the confession. The goal was to protect the fact-finding process. Under the amendment to Article 24, as implemented by the 1949 Manual, warnings were based on the constitutional right against self-incrimination. The goal was to ensure the accused was aware of his rights and the consequences of waiving those rights. A

failure to warn could no longer be overcome by an affirmative showing that the confession was obtained without coercion or unlawful influence. Trustworthiness of the confession was no longer the sole concern of the warning requirement.

Subsection 4: The Uniform Code of Military Justice, 1951

The third and final post-1916 legislative expansion of the right against self-incrimination occurred in 1951 when the Uniform Code of Military Justice became effective. Article 31, UCMJ, replaced Article of War 24. It stated that

> (a) No person subject to this chapter may compel any person to incriminate himself or to answer any questions the answer to which may tend to incriminate him.
>
> (b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this Article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.[136]

A close comparison of Article of War 24 after the Elston Act, with Article 31 of the UCMJ, reveals the significance of the final legislative expansion of the right against self-incrimination.[137]

Article 31(a) evolved from the first paragraph of Article of War 24. There were, however, some major differences. Under Article 24 the intended beneficiary of the protection was a "witness" in front of a judicial hearing, quasi-judicial hearing, or designated investigating officer. Under Article 31(a), all of the restrictive language about specific forums where the right against self-incrimination applied was eliminated. Furthermore, the intended beneficiary was no longer a "witness," but "any person." This change in the language of the first paragraph of Article 24 completed the process begun with the Elston Act. Under the Elston Act, "teeth" were added to prohibit coercion and unlawful influence, but not compulsion. Now,

compulsion was prohibited everywhere and at all times, in the same manner as coercion and unlawful influence.

Article 31(b) evolved from the second paragraph of Article 24. Again, the UCMJ extended the protection previously available. Under Article 24, only the accused benefited from the warning requirement. Article 31(b) added a person suspected of an offense to the category of protected persons.

The content of the warning remained the same, except that Article 31(b) added a warning concerning the nature of the accusation that was not present in Article of War 24.

Perhaps the most significant difference between Article 24 and Article 31(b) was the effect on the admissibility of a confession if warnings were not given. Under Article 24, the exclusion provision for unwarned confessions could be avoided if the government showed that the accused was otherwise aware of his rights. Under Article 31(b) and (d), a failure to warn resulted in automatic exclusion of the unwarned confession.

Looking at Article 31 from a purely logical standpoint and following the principle of natural statutory construction, the first three subsections state that no person subject to the Code can do "a," "b," or "c" (a: compel incriminating responses, b: interrogate a suspect or accused without providing warnings, or c: compel irrelevant degrading

responses). The last subsection, subsection (d), states that if a statement is obtained in violation of "a," "b," or "c," or through the use of "x," "y," or "z" (x: coercion, y: unlawful influence, or z: unlawful inducement), then the statement is inadmissible. Thus, there are six separate circumstance, or any combination of them, that would result in the exclusion of a statement. Observing the principle of natural statutory construction, if any one of the six circumstances occurs, the resulting statement must be excluded. It is illogical to interpret Article 31(b) as requiring the occurrence of "x," "y," or "z" in addition to a violation of "a," "b," or "c," in order to exclude a statement. If such an interpretation had been intended by Congress, the conjunction "and" would have been used in subsection (d), instead of the conjunction "or." Thus it is only logical that a failure to warn, as one of the six listed circumstances, requires automatic exclusion of the statement.

The manner in which the 1951 Manual for Courts-Martial implemented this automatic exclusion was peculiar. The 1951 Manual arbitrarily declared that failure to comply with Article 31(b) was equivalent to coercion, unlawful influence, and unlawful inducement, resulting in an involuntary confession, and thus exclusion.[138] The warning requirement, however, rested on the right against self-incrimination since the Elston Act. For the drafters of the 1951 Manual to associate failure to warn with words such as "coercion," "unlawful influence," and "unlawful

inducement," all of which had historically been associated with the common-law rule of confessions, appears to have been ill advised. That there has been so much confusion in this area of the law may stem in part from the choice of words expressed in the new legislative mandate.

The legislative history of the Elston Act reveals that rights warnings in the Army were required by the right against self-incrimination clause of the fifth amendment to the Constitution.[139] The legislative history of the UCMJ reveals that rights warnings in the military extended beyond the minimum requirements of the Constitution. Specifically, Article 31(b) and (d) went beyond the Constitution by automatically excluding unwarned confessions. Mr. Felix Larkin, Assistant General Counsel of the Department of Defense and chief coordinator for the creation of the UCMJ, testified before Congress on behalf of the proposed Article 31(b) that:

> [i]n addition we have provided, as you see, that a person must be first informed in effect that anything he says can be used against him. That is not a requirement normally found in civil courts--this provision of informing a man in advance....But here [in Article 31 (b)] we do provide that you must inform him in advance and if you don't, then anything he says is inadmissible as far as he is concerned.[140]

When Representative Elston expressed some doubt over Article 31(c), the protection against compelled self-degradation, giving too much protection, the following discussion relevant to Article 31(b) took place between Representative Elston, Representative Brooks, and Mr. Larkin:

> Mr. Elston: I think ... [Article 31(c)] gives too much protection. It enables the guilty person to escape.
>
> Mr. Larkin: Well, in the same way providing an obligation to inform him before he speaks is more than the usual protection.
>
> Mr. Brooks: You mean the constitutional provision?
>
> Mr. Larkin: So far as incrimination is concerned.
>
> Mr. Elston: That is all right. That is up above....That is in subsection (b). That is perfectly all right.[141]

This discussion highlights the fact that in the minds of the congressmen, the Constitution, not the common-law rule of confessions, was the policy basis for Article 31(b). More importantly, however, the warning requirement provided more than usually required. Since the Constitution provides minimum requirements at all times, any protection that is more than the usual protection, must be more than the constitutional minimum requirement.

Article 31(c) evolved from the first paragraph of Article 24. Detailed analysis of this subsection is beyond the scope of this article because it deals with protection against self-degradation.[142]

Article 31(d) emanated from the second paragraph of Article 24. Some of the effects of this subsection were discussed above.[143] There are two other significant differences worth noting. First, under Article 24 the intended beneficiary of the protection against coercion and unlawful influence was the accused person or witness. Under Article 31(d) the beneficiary was any person, including a suspect.

The second difference was that the scope of prohibited activities that would result in exclusion of confessions was increased from coercion and unlawful influence in Article of War 24, to a violation of Article 31(a), (b), or use of coercion, unlawful influence, or unlawful inducement, under Article 31(d). The reason for the addition of the words "unlawful inducement" is not perfectly clear. When subsection (d) was originally proposed, it deleted the words "coercion or unlawful influence" found in Article 24, and substituted therefore the words "unlawful inducement".[144] It seems the phrase "unlawful inducement" was intended to be all encompassing. This new approach did not win favor with some of the witnesses before Congress because they felt the phrase "unlawful inducement" was not adequately defined anywhere in the UCMJ. As a compromise, Congress included all three phrases in Article 31(d).[145] The

point to appreciate is that the phrase "unlawful inducement" embraced "coercion" and "unlawful influence;" it did not necessarily represent a totally independent type of misconduct by investigators.

The key points of the Expansion stage are numerous. The revision of Article 24 in 1920 when the term "officer conducting an investigation" was added to the list of forums where the right against self-incrimination applied, was arguably the first step in the expansion of the right beyond the confines of traditional tribunals. The 1921 Manual for Courts-Martial recognized that an obligation to warn had devolved upon investigating officers and other military superiors, but this obligation was based on the common-law rule of confessions, and its underlying concern was the trustworthiness of the confession. The Elston Act transformed the warning requirement into a tool to effectuate the right against self-incrimination. The Act put teeth in the law to strengthen the right against self-incrimination against coercion and unlawful influence practiced during pre-hearing investigations. The warning requirement, however, could be overcome if the government could show the accused was <u>otherwise aware of his rights</u>. The UCMJ prohibited the use of compulsion at all stages of the criminal justice process, not just at formal hearings. Warnings were required to be given to suspects, and the government could not escape the exclusionary rule for unwarned confessions, even if the suspect or accused was otherwise aware of his rights. The 1951 Manual defined an involuntary confession to be one that, among

other things, was obtained in violation of the warning requirement. Thus a failure to warn resulted in a per se involuntary, and inadmissible confession.

Subsection 5: Significance of the Developments of the Right Against Self-Incrimination and the Duty to Warn in the Military

The courts-martial system as adopted from the British in 1775 did not recognize the right against self-incrimination or the common-law rule of confessions. From this beginning, a gradual evolution from an inquisitorial to an accusatorial legal system took place. By 1951, the military accused enjoyed most of the legal protections afforded a civilian defendant in the federal criminal justice system. In some respects, the military accused possessed greater protection under the UCMJ than his civilian counterpart did under the Constitution.

One of the areas where the protection of the accused extended beyond the minimum requirements of the Constitution was in the area of self-incrimination. Over 175 years of legislative reform in the area of self-incrimination in the Army culminated in Article 31. This unique statute enumerated five ways in which the right against self-incrimination could be violated: 1) compulsion, 2) failure to warn of rights, 3) coercion, 4) unlawful influence, and 5) unlawful inducement. Even though these are different means of

violating the right against self-incrimination, the important point is that Congress created the same penalties for using any of these means to violate a person's right.[146]

Article 31 combined the right against self-incrimination and the common-law rule of confessions into one article. This fusion of two different legal principles with different histories and policy objectives produced a new, greater protection for military accused. Specifically, Article 31(a) extended the traditional application of the right against self-incrimination from criminal trials "to all persons under all circumstances."[147] Article 31(b) created an absolute obligation to warn a suspect, as well as an accused, before any questioning takes place. Article 31(d) not only excluded confessions obtained in violation of subsections (a) and (b), but also if coercion, unlawful influence, or unlawful inducement were used to obtain the confession. Article 31, therefore, embraced <u>multiple</u> new policy objectives.

Why did Congress take the unprecedented step of creating an absolute requirement to warn? Although there is no mention of the specific reason for this during the congressional hearings, it may be assumed that Congress believed that in the military, warnings were essential to the effective exercise of the right against self-incrimination. Subtle, and not so subtle, pressures of rank and duty position are not a problem in civilian law enforcement activities. Warnings in the military inform the suspect that he has a right not

to answer any questions concerning the matter under investigation, regardless of the questioner's rank or duty position.

The warning, however, also reminds the questioner that the suspect is entitled to the right against self-incrimination. Military leaders operate in an authoritarian environment. They often expect immediate answers to their questions from subordinates. Warning a suspect reminds the questioner of the suspect's constitutional right.

I believe another policy objective of the warning requirement is that the warnings actually warn the suspect that he is facing a situation where it may be advantageous to exercise his right. In the military, unlike the civilian community, it may not always be clear that such a situation exists. Military leaders often perform law-enforcement functions as part of their duties. In the civilian community, only police officers are generally involved in law enforcement activity. Therefore, the military suspect may know in a general sense that he has a right to remain silent, and the consequences of waiving that right, but he may not be aware that he faces an adversarial situation where he might want to exercise his right. For example, the suspect may believe the platoon sergeant is questioning him about his finances to help the suspect balance his bank account. The suspect does not realize that the sergeant is asking the questions in a law-enforcement capacity, to get evidence against the soldier for use at a court-martial. Warnings by the

platoon sergeant would alert the suspect of the danger that he faces, allowing the suspect to make an intelligent decision concerning the waiver of his right to remain silent.

The change in paragraph 136(b) of the Manual for Courts-Martial from 1949 to 1951 implemented Article 31(b)'s policy objective of actually warning a suspect of the hidden self-incrimination pitfalls lurking in certain types of questioning. The 1949 Manual contained a narrow escape clause for avoiding the exclusion of an unwarned confession: the government could show that the accused was generally aware of his rights, even if he had not been warned. The 1951 Manual eliminated that escape clause, making an unwarned confession per se inadmissible. This change demonstrates that the broadest policy objective of Article 31(b) was to actually warn the suspect of the possible need to exercise his constitutional rights in a particular situation.

PART IV

TESTS DEVISED BY THE JUDGES OF THE COURT OF MILITARY APPEALS TO ANSWER THE QUESTION: WHO MUST GIVE ARTICLE 31(b) WARNINGS?

Why has there been so much difference of opinion over the seemingly simple language of Article 31(b)? The answer is that different judges on the Court of Military Appeals have emphasized different policy objectives embodied in the warning requirement. Consequently, they formulated different tests to implement the different policy objectives.

The Court of Military Appeals has demonstrated some difficulty in adhering to any one test. Over the years, the judges have created four different tests to interpret the meaning of Article 31(b). The tests are labeled with a case name or judge's name and a descriptive phrase. The four tests are: 1) The Wilson Literal Interpretation test; 2) Judge Latimer's Officiality test; 3) The Duga-Gibson Officiality Plus Perception test; and 4) The Dohle Position of Authority test. Part V will summarize the facts of the lead cases and the test will be identified. It will also discuss the rationale and underlying policy of each test, as well as the test's strengths and weakness. Before discussing the tests, collateral issues surrounding the question of who should warn under

Article 31(b) will be briefly examined so as to narrow the scope of the central discussion.

Section A: Narrowing the Scope of Discussion

The plain language of Article 31(b) sets three conditions before a person is required to give warnings: 1) the person must be subject to this chapter, 2) the person must be interrogating or requesting a statement, and 3) the person must be questioning an accused or suspect. Some of the legal issues implicit in these conditions are well settled and will not be discussed in detail. They are issues of fact, not law, and will be identified to narrow the scope of the principal discussion to the unsettled legal issue.

What does the first condition of "subject to this chapter" mean? The chapter refers to the Uniform Code of Military Justice.[148] Article 2 of the UCMJ defines very clearly who is subject to the Code. Basically, Article 2 refers to persons on active duty in the United States armed forces.[149]

Civilian and foreign law-enforcement officials are not subject to the code. Yet they often interrogate and request statements from active duty military persons suspected of crimes. Although some thought civilian law-enforcement officers ought to be required to follow Article 31(b), most congressmen decided to

exclude civilian and foreign law enforcement officials from the warning requirement because these officials would probably be unfamiliar with the requirements of Article 31(b).[150] Even if the civilian and foreign officials were familiar with Article 31(b), there would be no way to force compliance.

A different situation exists when the civilian or foreign law-enforcement official acts as the knowing agent of the military. In 1954, the Court of Military Appeals decided that if an agency relationship existed between the civilian or foreign questioner and a military law enforcement official, Article 31(b) warnings were required.[151] The court explained that for an agency relationship to exist, the non-military questioner must have acted under the direct control or supervision of the military officer, or must have acted solely in the furtherance of a military investigation. If the civilian or foreign questioner had non-military motives for his actions, then no agency relationship existed.[152] The only issue for the trial judge is factual: Did an agency relationship exist under the circumstances? Military Rule of Evidence 305(b)(1) adopted the court's interpretation of Article 31(b), defining a "person subject to the code" as including "a person acting as a knowing agent of a military unit or of a person subject to the code."[153]

Recognition of this agency relationship has been the only judicial expansion of the plain meaning of the words of Article 31(b). All of the other tests developed by the Court of Military Appeals have either

given a literal interpretation to the words, or more often, constricted the plain meaning of the words.

What does the second condition of "interrogating or requesting a statement" mean? Military Rule of Evidence 305(b)(2) defines interrogation as including "any formal or informal questioning in which an incriminating response is either sought or is a reasonable consequence of such questioning."[154] The Supreme Court has interpreted the term "interrogation" to include any conduct reasonably calculated to elicit a response.[155] Spontaneous, unsolicited statements from a suspect or accused, however, do not require Article 31(b) warnings.[156] The only issue for the trial judge is a factual one: Was the conduct of the military official reasonably calculated to elicit a response, or was the statement unsolicited?

What does the third condition of questioning an "accused or suspect" mean? An accused is a person who has had charges preferred against him.[157] A suspect is a person who the questioner reasonably believes may have committed an offense.[158] Whether or not the questioner holds such a belief will be determined by the trial judge using an objective, reasonable standard test in light of all the information the questioner possessed. The issue is a factual one: Did the government official reasonably suspect the person of committing a crime?

Section B: The Tests

Since 1953, the judges on the Court of Military Appeals have been trying to reach a lasting consensus on who is required to warn under Article 31(b). The task has been difficult because of the multiple policy objectives underlying the warning requirement. Thus, judges are able to legitimately choose the interpretation of Article 31(b) emphasizing the policy objective they prefer. The first case to raise the issue before the court was United States v. Wilson.[159]

Subsection 1: The Wilson Literal-Interpretation Test

Corporal Austin Wilson, Jr., and Private E-2 Bennie Harvey, U. S. Army, were convicted of premeditated murder of a South Korean civilian. The murder took place in Puchang-ni, South Korea, on April 10, 1951. The operative facts of the case follow:

> A military police sergeant named Wang, while on patrol duty, received notice of a shooting in the 503d Battalion area. He went to the area and there observed a group of soldiers

> standing about a fire. A military policeman pointed out ... [Wilson and Harvey] as the persons identified to him by a group of Koreans as the men who had shot their countryman. The sergeant approached the group and, without addressing any member by name -- but looking directly at [Wilson and Harvey] -- asked who had done the shooting. He made no preliminary reference to the privilege against self-incrimination secured at that time by Article of War 24....[Wilson and Harvey] responded to the question with the statement that they had 'shot at the man'.[160]

Even though Article of War 24 was in effect at the time of the shooting, for reasons beyond the scope of this article, the majority of the court decided to apply Article 31(b). Thus, the decision of Judge Brosman, concurred in by Chief Judge Quinn, was based on Article 31(b).

In reaching its decision, the court made it clear that the admission by the appellants was voluntary in the traditional sense.[161] In other words, Sergeant Wang used no coercion or unlawful influence to extract the admission from the appellants. Next, the court spelled out Article 31(b) and (d). The court then announced its test and rationale. It declared that the

> provisions [of Article 31(b) and (d)] are as plain and unequivocal as legislation can be.

> According to the Uniform Code, Article 2, 50 USC 552, Sergeant Wang was a 'person subject to this code,' and [Wilson and Harvey] at the time the question was directed to them, were persons 'suspected of an offense.' Consequently, the statements should have been excluded in accordance with Article 31(d), and their admission was clearly erroneous.[162]

The court interpreted the language of Article 31(b) and (d) literally. The test was simply to ascertain whether the questioner was subject to the Code and whether the person questioned was a suspect or accused.

After concluding that it was error to admit the unwarned statements into evidence, the court faced the issue of whether the error was prejudicial to the accused, requiring reversal of the convictions. It was at this point, after deciding that the "plain and unequivocal" language of Article 31(b) and (d) required a preliminary warning, that the court said

> [w]here -- as here -- an element of officiality attended the questioning which produced the admissions, there is much more than a violation of the naked rule of Article 31(b), ... there is an abridgement of the policy underlying the Article which must -- we think -- be regarded as 'so overwhelmingly important in the scheme of military justice

> as to elevate it to the level of a creative and indwelling principle'....To put the matter otherwise, we must and do regard a departure from the clear mandate of the Article as generally and inherently prejudicial.[163]

The test for deciding who must warn under Article 31(b) was what the plain and unequivocal language of Article 31(b) required. Whether there was or was not an element of officiality attending the questioning was only a factor on appeal to determine whether the error was inherently prejudicial.

What policy did this test effectuate? Judicial restraint was the court's policy objective. Judge Brosman and Chief Judge Quinn recognized that under Article of War 24, military officers and investigators had a duty to warn accused persons, but Article 31(b) extended the duty to warn to include suspects. This change was "a new legislative mandate which redound[ed] to the benefit of an accused person."[164] Judge Brosman concluded that

> [i]t is, of course, <u>beyond the purview of this Court to pass on the soundness of the policy</u> reflected in those portions of Article 31 [(b) and (d)] ... which extend the provisions of its comparable predecessor, Article of War 24 ... and no sort of opinion is expressed thereon.[165]

Judge Brosman and Chief Judge Quinn made it clear that they were not going to judge the wisdom of Congress for extending the duty to warn to suspects. They refused to give a clearly written law an interpretation contrary to its plain and unequivocal meaning just because they might disapproved of the law. In their view, that would have been unacceptable judicial legislation.

What were the strengths of the literal interpretation test? This test contained two interrelated strengths: it implemented the policy of judicial restraint, and it provided a suspect or accused the most extensive blanket of protection. The policy of judicial restraint is a cornerstone of our American system of government. Under the constitutional framework of government, judges lack the authority to substitute their judgement for Congress' judgment, unless the statute fails to meet the minimum protections afforded by the Constitution. Article 31(b), however, affords military suspect more protection than the Constitution requires. Thus, it may be argued that the judges of the Court of Military Appeals lack the legal authority to curtail the additional protection granted by Congress in Article 31(b) by interpreting the language more restrictively than its plain meaning. The only justification for a narrower interpretation would be if there was something in the legislative history of the warning requirement compelling an unnatural interpretation of Article 31(b). The legislative history of Article 31(b), however, does not compel such an interpretation.

By giving the words of Article 31(b) their plain meaning, the Court of Military Appeals created the largest possible blanket of protection for suspects and accuseds in the area of rights warnings. The tests that followed Wilson provided a much smaller blanket of protection, by restricting, in varying degrees, the extent of coverage of Article 31(b). In other words, the literal-interpretation test implemented the most liberal policies underlying Article 31(b). The individual accused certainly considered this feature to be a strength of the test.

The literal-interpretation test contained three principal weaknesses: it excluded relevant, trustworthy confessions under more circumstances than did the subsequent tests; it created criminal liability for friends of the suspect who asked questions for personal reasons; and, it reduced the effectiveness of counseling sessions conducted by military superiors trying to help subordinates in trouble.

By providing the largest blanket of protection for the individual, the literal interpretation test necessarily excluded relevant, trustworthy confessions more often than any of the subsequent tests. The more often reliable confessions are excluded from trial, the less often the trial fact-finder will arrive at an accurate result because he has less information on which to base a decision.

The second weaknesses with the literal interpretation test ensued from the fact that the test required warnings in situations where the questioner only had personal motives, not official motives, for talking to the suspect. In other words, it applied even where the questioner was not representing the United States government during question of the suspect. For example, if a soldier wanted to provide helpful guidance to a friend that he suspected of having committed a crime, the soldier could not talk to the suspect about the crime, without first providing Article 31(b) warnings. If the soldier failed to provide Article 31(b) warnings before asking the suspect a question about the crime, the soldier would be subject to criminal liability under Article 98, UCMJ, even if he was only trying to help the suspect do the right thing.

Article 98 imposed criminal liability for a violation of Article 31(b), regardless of the questioner's motive, once a determination was made that the article has been violated. Although to date there has never been a reported case of a conviction under Article 98 for a violation of Article 31(b), the drafters of Code intended Article 98 to be an important part of the enforcement mechanism for Article 31.[166] The literal interpretation test could have resulted in criminal liability for a friend of a suspect who tried to help the suspect correct his ways. Congress could not have intended for such an absurd situation to occur.

The third weakness with the Wilson literal interpretation test is that it could have significantly reduced the effectiveness of counseling sessions in the military. The test required warnings any time a questioner subject to the Code suspected someone of an offense, even in situations where the questioner was acted in an official capacity, but not a law-enforcement capacity. For example, if a first sergeant wanted to provide marriage counseling to a young soldier experiencing marital problems, but he suspected the soldier of adultery, the first sergeant had to first advise the soldier of his right against self-incrimination. Assuming the first sergeant was motivated by his official duty to ensure the health and welfare of his troops, it could be said he represented the government in an official capacity, but he was not representing the government in a law-enforcement capacity. In other words, the information sought by the first sergeant was not intended for use at court-martial. Since Article 31(b) does not say "advise a suspect of his rights only if the information is intended to be used against him at court-martial," the literal-interpretation test required warnings be given during official, yet non-law-enforcement counseling sessions.

The problem with this scenario is that after the warnings, the soldier would probably be very reluctant to talk to the first sergeant. Even if the soldier decided to talk, the rights warnings would certainly chill the discussion, thus reducing the effectiveness of the counseling. The literal-interpretation test's

potential for severely limiting the usefulness of counseling sessions between a military leader and his subordinates was a significant weakness of the test.

Supporters of the literal-interpretation test might respond to the this criticism by arguing that the first sergeant in the scenario did not really have to warn the soldier, even though Article 31(b) technically required it. The rationale is that since the consequence for not warning was the exclusion of the evidence at court-martial, and since the evidence was not obtained for use at court-marital, then nothing was lost by intentionally ignoring Article 31(b). This argument, however, reflects a dangerous attitude that it was all right to ignore the law, so long as the consequences are acceptable. The first sergeant would also have been subject to criminal liability under Article 98 if he intentionally ignored proscription of Article 31(b).

Subsection 2: Judge Latimer's Officiality test

Judge Latimer dissented in the Wilson case. He believed that "Congress undoubtedly intended to enlarge the provisions of Article of War 24, ... but [he did] not believe it intended to go so far as to prevent all legitimate inquiries."[167] Unless the questioning had an element of officiality, there should be no duty to warn, and thus no error in admitting the statement. Judge Latimer's view of the officiality condition

differed from Judge Brosman's and Chief Judge Quinn's view in a profound way. The Wilson majority viewed the officiality condition as a factor for the appellate review boards to consider in determining whether the error of admitting an unwarned confession was inherently prejudicial. Judge Latimer viewed the officiality condition as a factor for the trial judge to consider in determining the admissibility of the confession.

The Officiality test as originally expressed by Judge Latimer contained three conditions. A person subject to the code had a duty to warn only if: 1) the person asking the question occupied some official position in connection with law-enforcement or crime detection, and 2) the inquiry was in furtherance of some official investigation, and 3) the facts had developed far enough that the person conducting the investigation had reasonable grounds to suspect the persons interrogated had committed an offense.[168]

What policy did the officiality test implement? Judge Latimer believed that the practical necessities of law enforcement had to be considered when interpreting Article 31(b). He said

> I cannot believe Congress intended to silence every member of the armed forces to the extent that Article 31 ... must be recited before any question can be asked....Congress passed an act which is couched in broad and sweeping language, and, if it is not limited

> by judicial interpretation, then the ordinary processes for investigating crime will be seriously impaired.[169]

Judge Latimer cited no authority to support his belief.

What were the strengths of the officiality test? First, it struck a more proportioned balance, as compared to the literal interpretation test, between the suspect's need for protection, and the government's needed for the admission of relevant, reliable confessions into evidence. The officiality test accomplished this feat by requiring warnings only if the questioner was motivated by an official law-enforcement concern. Mere official questioning, such as a counseling session, was not enough to trigger Article 31(b). The questioning had to be "in furtherance of an official investigation," or in other words, a law enforcement activity.

Judge Latimer did not find any express support for his conclusion in the congressional hearings on the UCMJ. Strong circumstantial evidence, however, supported his position. First, the overall history of the right against self-incrimination and the rights warnings, supports the officiality condition. The right against self-incrimination limited the criminal law-enforcement powers of the federal government. The right was not intended to protect individuals from questioning conducted by persons acting on personal motives. The right was also not intended to protect

individuals from questioning, even if from a government official, that sought information for non-law enforcement use. Historically, rights warnings should only be required when the questioner interrogated a suspect on behalf of the government, while acting in a law-enforcement capacity. This is precisely how Judge Latimer interpreted Article 31(b).

Another strength of the officiality test was that it maintained the effectiveness of the deterrent effect embodied in exclusionary rule of Article 31(d). The purpose of the exclusionary provision of Article 31(d) is to punish the government if it uses methods that violate the right against self-incrimination. The theory is that the government will attempt to avoid the exclusion of confessions, and thus be forced to respect an individual's right against self-incrimination. Accordingly, Article 31(d) should not be used to punish the government in a situation where there was no governmental action. The officiality test maintains the effectiveness of the deterrent effect of Article 31(d) by applying it only to situations which are truly deserving.

Finally, the officiality test eliminates the potentially absurd situation of imposing criminal liability under Article 98 on a soldier who tries to steer a friend in trouble in the right direction. Article 98 seeks to punish <u>individuals</u> subject to the Code who violate provisions of the Code, rather than seeking to punish the <u>government</u>, as does Article 31(d). If the questioner who failed to warn the

suspect was only trying to help the suspect as a friend, or counsel him as his leader, what purpose is served by punishing the questioner? The deterrent effect would be reversed. Persons subject to the Code would be deterred from helping friends in need, rather than deterred from violating the Code. Thus, comraderie and esprit de corps within the unit could be diminished. Assuming that comraderie and esprit de corps enhance a unit's fighting capabilities, a reduction in these commodities would consequently reduce the unit's fighting capabilities. The officiality test avoids this negative impact on military units by removing the threat of criminal liability from those who seek to help and counsel friends and subordinates in need.[170]

The officiality test is not perfect. Regardless of how logical the officiality test may appear, and how much circumstantial evidence exists in its support, it is inconsistent with the plain language of Article 31(b). Judge Latimer did not provide any authority to support his belief that Congress intended an officiality condition be met before warnings were given. Even though the right against self-incrimination was intended to limit only governmental law-enforcement action, Article 31(b) plainly goes beyond that minimum requirement. The legislative record reflects some congressional intent to provide more protection under Article 31(b) than what is required by the Constitution.[171] The lack of explicit legislative history supporting Judge Latimer's officiality condition, and the existence of some

evidence contrary to his position, undercuts the otherwise strong logic of the test.

Another imperfection with the officiality test is its difficulty of application, relative to the literal interpretation test. Under the officiality test, the trial judge is expected to conduct an objective inquiry into the subjective motives of the questioner. In some cases, this may be difficult to do, thus increasing the probability of inconsistent results occurring in cases with similar facts. Such inconsistent results would reduce the precedential value of decisions.

Finally, the officiality test creates too great of an opportunity for the trial counsel to shape the testimony of the questioner as to the motive for asking the questions. Before trial, the shrewd trial counsel could subtly persuade the questioner that the questioner's motives were purely personal, or not law-enforcement related, even if the questioner had some doubts about his motives before seeing the trial counsel. If the trial counsel persuades the questioner, and the questioner persuades the judge, the confession will be admitted, despite the official law-enforcement nature of the questioning.

The boards of review decisions following Wilson focused on the element of officiality surrounding the questioning.[172] In each case, the boards examined the facts to determine whether the questioner acted in an official-law enforcement capacity, in furtherance of an official investigation. Generally, the boards of

review held that if the questioner did not act in an official law-enforcement capacity, there was no need to warn and thus no error in admitting the unwarned confession.[173] The boards of review seem to have taken the "officiality" language used by the majority in Wilson, and applied it in a manner more consistent with Judge Latimer's dissenting opinion.

When were warnings required? If the questioner was a military policeman interrogating a suspect, in furtherance of an official investigation into a specific offense, then rights warning were clearly required.[174] The boards of review interpreted the officiality condition as also applicable to persons other than those occupying law-enforcement positions. Officers performing law-enforcement functions had to give warnings, even if they were not military policemen. For example, if a commander conducted a preliminary investigation of alleged crimes in his unit, he had a duty to warn.[175] Likewise, if the installation inspector general conducted an investigation into alleged crimes at the direction of the commander, he had a duty to warn.[176] The key to the officiality condition, therefore, was to determine the questioner's motive or capacity in which he acted, rather than the position he occupied.

When were warnings not required? In United States v. Williams,[177] warnings were not required when the unit commander relieved the custodian of an official fund from that position, even though the commander suspected the custodian of the fund of larceny and

questioned him concerning the missing money. The Air Force Board of Review found that the commander was performing an official duty incident to command, not a law-enforcement duty. Since the commander was not acting as a law enforcement official, he had no obligation to warn the suspect. In United States v. King,[178] the court found that a sergeant was performing duties as health and welfare counselor, not law enforcement official, when he questioned a soldier about the soldier's slovenly appearance. Even though the sergeant suspected the soldier of some misconduct, the sergeant's motive was to provide guidance and counseling to the soldier concerning personal hygiene, thus he had no duty to warn. The boards of review recognized that military leaders perform many official duties.[179] The officiality test created by Judge Latimer and adopted by the boards of review, required rights warning only when the questioner discharged his official law-enforcement duties.[180]

Subsection 3: The Duga-Gibson Officiality Plus Perception test

United States v. Duga[181] sets forth the test currently being used by the Court of Military Appeals to answer the question of who must warn under Article 31(b). Duga requires two conditions be satisfied before warnings are given: 1) the questioner acted in an official capacity,[182] and 2) the suspect perceived the official nature of the questioning. This test was

originally articulated in United States v. Gibson,[183] which was decided in 1954, just one year after Wilson. Gibson and Duga will be discussed in chronological order.

United States v. Gibson

U.S. Army Private Lloyd Gibson was placed in pre-trial confinement because he was suspected of stealing money from vending machines on Fort Sill, Oklahoma. A Criminal Investigations Division (CID) agent instructed the provost sergeant in charge of the confinement barracks to assign another prisoner to watch Gibson to see if he could get some information. The CID agent suggested that a good reliable "rat" be selected for the job. The provost sergeant assigned Private First Class Jimmie Ferguson to Gibson's confinement barracks for that purpose, since Ferguson was already in confinement on unrelated charges, and the provost sergeant believed Ferguson to be a good "rat." The provost sergeant did not tell Ferguson specifically what type of information to get from Gibson, but did tell Ferguson that he could visit the CID office whenever he needed to.

Ferguson testified at Gibson's court-martial that at the time he was assigned to the same confinement barracks with Gibson, he already knew Gibson from a previous mutual confinement. Based on this prior acquaintance, Ferguson asked Gibson why he was confined

this time. Ferguson, of course, did not preface the question with a rights warning. Gibson confessed that he had broken into the vending machines and stolen the money. Ferguson retold the confession at Gibson's court-martial.

Chief Judge Quinn, with Judge Brosman concurring, first made a factual determination that "the evidence permits no conclusion other than that Ferguson was placed near Gibson at the direction of agents of the [Criminal Investigative] Division for the sole purpose of procuring incriminating statements."[184] The court found that Ferguson acted as official agent of the CID, and thus believed his questioning was motivated by official law-enforcement concerns.[185] In doing so, the court implicitly accepted the officiality requirement articulated by Judge Latimer in Wilson, and rejected the literal-interpretation test. If Chief Judge Quinn and Judge Brosman had ended their analysis there, under the facts of this case, the officiality condition was satisfied, and warnings were required. The judges, however, did not cease their inquiry there.

Chief Judge Quinn reviewed the history of Article 31(b) and concluded that it was intended to alleviate the pressures generated by "the effect of superior rank or official position upon one subject to military law...."[186] The Chief Judge said "[n]o one could reasonably infer from any of the surrounding circumstances that ... [Gibson] was placed in such a position as to compel a reply to questions asked by

Ferguson. The voluntariness of his statement is beyond question."[187]

In effect, Gibson required satisfaction of two conditions before a duty to warn existed. Judge Brosman's concurring opinion clearly identified the two conditions:

> Judge Latimer's view appears to be that, while officiality must exist to justify an invocation of Article 31(b), it will suffice if the questioner alone is aware of this officiality. Judge Quinn, on the other hand, and contemplating an 'implied coercion' criterion, would require in addition that the person questioned have reason to be aware of the official character of the interview.[188]

In other words, the Gibson test required officiality plus perception to trigger Article 31(b). Twenty-one years after Gibson, Duga expressed the same test.

United States v. Duga

Airman First Class Dennis Duga was convicted of larceny of a canoe from the Lowry Air Force Base recreational vehicle storage area. A key government witness was Airman Byers, an Air Force security policeman. Byers testified at Duga's court-martial

that Duga confessed the crime to him. The following facts detail how the confession was obtained.

Shortly after the theft of the canoe, an agent of the Office of Special Investigations (OSI) asked Byers if he knew anything that might connect Duga to the thefts from the base recreational vehicle storage area. Byers gave the agent no useful information. The agent then told Byers that "if [he] could give him any more information, it would be of help to him." Byers replied, "[i]f anything comes up, I'll see what I can do."[189]

Later that night, while Byers was posted on security police duty at one of the base gates, Duga rode up to the gate on a bicycle. Byers and Duga were in the same security police squadron and considered each other friends. They talked about various things in a very casual manner. Then, because Byers was curious about rumors he had heard concerning things that had been happening and because he "just kind of wondered whether he had been left in the dark about it," he asked Duga "what he was up to."[190] Duga responded with incriminating admissions concerning the recent thefts. Byers then asked Duga more questions concerning his conduct, and Duga confessed that he had stolen the canoe and some other property. Byers did not advise Duga of his rights at any time.

The next night, Byers had another conversation with Duga in the squadron dormitory where they both lived, in the presence of other people. Duga further

discussed his criminal involvement without receiving rights warnings.

Two days later, Byers decided to go to OSI with the information he had obtained about Duga. At Duga's court-martial, Byers maintained that he did not question Duga for the purpose of finding out information for the OSI, and that he never really thought about what he would do with the information at the time he received it.

Chief Judge Everett's opinion, concurred in by Judge Fletcher, revived the Gibson test. The court held that

> in each case it is necessary to determine whether (1) a questioner subject to the Code was acting in an official capacity[191] in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation. United States v. Gibson, supra. Unless both prerequisites are met, Article 31(b) does not apply.[192]

Applying this officiality plus perception test to the facts of the case, the majority found that as to the first condition, "the questioning was not done in an official capacity--that is Byers was not acting on behalf of the Air Force--either as a security policeman or as an agent of the OSI."[193] Furthermore, as to the second condition, "[t]he evidence portrays a casual

conversation between comrades, in which ...[Duga] voluntarily discussed with Byers his general involvement in crime....[T]here was no subtle coercion of any sort which could have impelled ...[Duga] to answer Byers' questions."[194] Neither of the conditions were met, thus Byers had no duty to warn.

The court cited Gibson in the heart of its test, and five other times throughout the opinion. The court demonstrated its reliance on the Gibson rationale by stating that "long ago in United States v. Gibson ...this Court concluded, after a careful study of the Article's [31(b)] purpose and legislative history, that Congress did not intend a literal application of that provision."[195]

What are the policy objectives underlying this test? The policy objective implemented by the first condition is the same as the officiality test's objective discussed above.[196] Gibson and Duga merely adopted Judge Latimer's officiality condition. The policy underlying the second condition was new. That policy was designed to permit undercover agents to operate without the limitations of Article 31(b). In the court's view, the compelling need for effective undercover operations justified an interpretation of Article 31(b) contrary to the plain meaning of its language.

What is the strength of this test? The Duga-Gibson test admits confessions in more situations than any of the other tests because it gives the government

two opportunities to escape the exclusionary provision of Article 31(d). As discussed above, the greater amount of relevant and trustworthy evidence is admitted at trial, the greater the chance the finder-of-fact will reach an accurate result. Therefore, the Duga-Gibson test theoretically provides the highest probability of an accurate finding by the court-martial, relative to the other tests devised by the judges of the Court of Military Appeals.

The specific strengths and weakness of the officiality, or first condition of Duga-Gibson, have already been discussed.[197] The remainder of the discussion in this subsection will focus on second condition of Duga-Gibson: the perception of officiality by the suspect.[198]

What is the strength of the second Duga-Gibson condition? The perceived officiality condition permits undercover agents the opportunity to accomplish their mission without having to give warnings, and thus reveal their identity. This was the specific policy objective behind the Gibson decision. Judge Latimer's officiality test and the literal-interpretation test required a military undercover agent acting in furtherance of an official investigation to advise the suspect according to Article 31(b), thus drastically curtailing the scope of undercover operations.[199] At best, undercover agents would only be able to observe and listen, but not ask any questions. Thus, their effectiveness would be substantially reduced.

The rationale used to support the perception condition of Duga-Gibson consisted of a simple chain of logical assumptions. If the suspect was not aware of the official nature of the questioning, he was under no pressure to answer. If there was no pressure to answer, there was no compulsion. No compulsion meant no violation of the right against self-incrimination. If there was no violation of the right against self-incrimination, there was no need to warn the suspect that he had the right to remain silent. Simply put, why warn a person that he had a right to protect himself from a danger, if the danger did not exist? The second Duga-Gibson condition denied the accused the opportunity to benefit from the exclusionary protection of Article 31(d) in situations where he felt no pressure to confess. It is unrealistic to assume that every time a person subject to the Code asks a subordinate a question, the subordinate feels compelled to answer. Allowing the government the opportunity to show that no compulsion was used to obtain the confession, fine tunes Article 31(b) so that only those persons who really need the protection of the warnings get it, and those that do not will not reap an undeserved benefit.

What was the fallacy in the rationale of the second condition of Duga-Gibson, and what potential harm could it cause? When Chief Judge Quinn reviewed the history of the warning requirement, he failed to account for the significant change in the nature of the warning requirement produced by the Elston Act and the UCMJ. His conclusion that Article 31(b) was only

intended to alleviate the pressures generated by the effect of superior rank or official position was partially correct. That was the original purpose for the warning requirement, but after the Elston Act in 1948, and especially after the UCMJ in 1951, the warning requirement implemented several policy objectives. The potential harm caused by this narrow interpretation was that military suspects and accuseds could be denied rights granted to them by Congress, and the morale of military units could be adversely affected.

First, a quick review of the history of the military warning requirement illustrates how Chief Judge Quinn interpreted Article 31(b) too narrowly. As discussed above,[200] the first evidence of a duty to warn appeared in the 1917 Manual for Courts-Martial, declaring that a duty to warn was "devolving upon investigators and military superiors" when conducting an investigation.[201] In 1917, warning an accused was the practice, not the law. If the rights warnings were not given by the military personnel conducting an investigation, the government could still prove that the confession was otherwise voluntary, and thus trustworthy enough to escape the exclusionary provision of the hearsay rule. Failure to warn created a rebuttable presumption of involuntariness under the common-law rule of confessions. The government had to make an affirmative showing that the confession was voluntary. Warnings were clearly a matter within the exclusive domain of the common-law rule of confessions.

Under the Elston Act, Congress expressed strong concern for ensuring respect of soldiers' constitutional right against self-incrimination. The Act elevated the duty to warn from the level of desirable practice under the common-law rule of confessions, to the level of federal law under the constitutional right against self-incrimination. The Elston Act, however, did not make unwarned confessions inadmissible per se. Nevertheless, the only way the government could admit an unwarned confessions under the Act was to show that the accused was "otherwise aware of his right against self-incrimination." The government could no longer escape the exclusionary rule by showing that the confession was truly voluntary.

This change in the very nature of the warning requirement was a novel, radical leap forward in the development of the warning requirement. Consider the critical difference in the treatment of unwarned confessions by the law prior to, and subsequent to, the Elston Act. Prior to the Elston Act, the government had the much easier burden of showing that an unwarned confession was "otherwise voluntary." After the Elston Act, the government had the more difficult task of showing that the accused was "otherwise aware of his right against self-incrimination." The objective of the warning in the first instance was to increase the probability of obtaining a voluntary, and thus trustworthy confession. The objective in the second instance was to ensure the accused knew he had a constitutional right to remain silent. In keeping with

its objective, the Elston Act required all persons conducting an investigation to warn an accused. No after-the-fact inquiries into the perceptions of the accused were permitted, unless it was for the limited purpose of showing that the accused was "otherwise aware of his rights." The Elston Act pushed the warning requirement into a totally new dimension.

The radical leap forward for the warning requirement under the Elston Act was followed shortly by the continued advances of the UCMJ. Article 31(b) and (d) made the duty to warn absolute. The government lost its last after-the-fact method for avoiding the exclusion of an unwarned confession. The possibility of escaping the exclusionary provision of Article 31(d) by showing the accused was already aware of his rights disappeared. The 1951 Manual for Courts-Martial equated a failure to warn with compulsion, coercion, unlawful influence, and unlawful inducement, thus making an unwarned confession per se involuntary. The objective of the warning under Article 31(b) was not just to make a suspect or accused generally aware of his constitutional rights, but also to ensure the suspect or accused was actually warned of his rights, whether or not he was already aware of them. Only by requiring mandatory warnings, could Congress be assured that a suspect would be put on notice that a military superior asking him questions did so in a law-enforcement capacity, and not in a personal capacity, or in one of his many other official, non-law-enforcement capacities.

The concept of an unwarned confession being per se involuntary under certain circumstances was unique to the military until 1966. In Miranda v. Arizona[202] the Supreme Court decided that an unwarned confession obtained by police during custodial interrogation was per se involuntary. The Court did not permit the government to show that the unwarned confession was obtained without coercion or compulsion, thus making it voluntary. The Court believed that the only effective method for safeguarding the suspect's right against self-incrimination during custodial interrogations was to create an irrebuttable presumption that coercion existed, even if it did not. The Court also expressly prohibited the government from escaping the exclusionary rule by proving the accused was otherwise generally aware of his rights.[203] Warnings had to be actually given to all persons interrogated while in custody.

Although Article 31(b) and Miranda required warnings under different circumstance, the analytical approach was very similar. Both created irrebuttable presumptions that under certain circumstances, an unwarned confession was per se involuntary. Why did Congress and the Supreme Court resort to the creation of such a drastic legal device as an irrebuttable presumption under certain circumstances? They believed it was essential to formulate a strong rule with no loopholes to insure the adequate implementation of the right against self-incrimination. Anything less than an irrebuttable presumption was too susceptible to circumvention and evasion.

Miranda and Article 31(b) both use rights warnings as the tool for implementing the right against self-incrimination, but in different environments. In Miranda, the rights warnings help neutralize the implicit coercion of the custodial interrogation environment. There is less of a need, as compared to the military environment, to alert the suspect that he faces a situation where he may wish to invoke his right against self-incrimination because the very nature of the custodial interrogation makes it obvious that the questioner is acting in an official law-enforcement capacity.

In Article 31(b), the rights warning serve three purposes. First, the warnings serve to neutralize the implicit coercion or influence generated by rank and duty position. Second, the warnings generally inform the ignorant suspect or accused of his constitutional rights. Finally, the rights warnings alert the suspect or accused that the questioner is acting in an official law-enforcement capacity, not in the suspect's best interest.

The Supreme Court recognized the need for the third and highest, most sophisticated purpose of rights warnings even in the civilian community, where the need is not as critical as is in the military environment. In Miranda, the Court proclaimed that "warning[s] may serve to make an individual more acutely aware that he is faced with a phase of the adversary system--that his

is not in the presence of persons acting solely in his interest."[204]

The second condition of Duga-Gibson turns the clock back on the reforms made by Congress in the Elston Act and UCMJ. It changes the intended irrebuttable presumption of Article 31(b) and (d) into a rebuttable presumption by allowing the government to do what it used to do before the Elston Act: make an affirmative showing that the confession was "otherwise voluntary" by demonstrating that the accused perceived no officiality in the questioning and thus was under no pressure to answer the questions. Duga-Gibson's second condition ignores the fact that the 1951 Manual for Courts Martial equated a failure to warn with an involuntary confession.

What is the potential harm resulting from the error of the Duga-Gibson second condition? Military leaders could question a subordinate suspect under the pretext of counseling him for his own good, while in reality, functioning as a law-enforcement investigator. I believe this cruel deceit would not only betray the trust the individual suspect had in the leader, but many others in the unit would also loose confidence in the leader, thus lowering the unit's morale.

A closer examination of the uniqueness of military leadership reveals how lower unit morale could occur as a result of the Duga-Gibson second condition. First, one must appreciate the fact that military leaders perform many different functions as part of their

official duties. A civilian manager has only one official relationship with his subordinate employees: he is their supervisor. In the military, the company commander, first sergeant, platoon sergeant, have many official relationships with their subordinates: combat leader, mission supervisor, teacher, big brother, financial, marriage and health counselor, and many others.

Maintaining good order and discipline is also an important official duty of the military leader. A unit without these attributes cannot fight and win. Thus, the military leader is also a law-enforcer. As part of the law-enforcement activities, the military leader may have to conduct an investigation. Suppose the military leader decides he is going to deceive the suspect by making him believe the questioning is motivated by a non-law enforcement reason, when in fact the purpose is to obtain an incriminating confession. Is this scenario different from a traditional military undercover operation where the agent's identity is hidden? In Gibson, Chief Judge Quinn and Judge Brosman drew no distinction between these two types of deceit. Trickery was permissible so long as there was no pressure on the suspect to talk. They believed that since the officiality of the questioning was hidden during undercover questioning, there was no danger of subtle military pressures generated by rank or duty position.

A closer look at these two types of deception reveals a significant difference in their method. In

the traditional military undercover operations, the suspect does not know the true identity of the undercover agent. The suspect trusts the undercover agent because he wants to share his exploits with someone else, or make a friend, or sell drugs, or for numerous other reasons. When the suspect is betrayed by the unknown undercover agent, he truly has no one to blame but himself for being careless enough to talk with someone he did not know well.

The situation is totally different when the deception is perpetrated by the suspect's military leader. To make the deception work, the suspect must believe the military leader is acting in one of the recognized official capacities of a military leaders, such as counselor or job supervisor, thus implying confidentiality of the information from law-enforcement officials. For example, if the suspect believes his platoon sergeant was counseling him to help him get over a drug problem, when in fact the platoon sergeant was really trying to obtain incriminating information, what impact will the betrayal have on the suspect and the other members of the unit? I believe the suspect is not going to blame himself for being careless, nor are many of the other members of the unit. They will view it as a betrayal of that military leader's trust, ruining the leader's future effectiveness in that unit, thus lowering the morale. The potential for harm to unit morale and cohesion far outweigh any possible crime solving benefits by this type of deceptive tactic. Yet this type of ruse is permitted by the Duga-Gibson second condition.

Can the potential for harm under the Duga-Gibson second condition be reduced or eliminated, and yet still permit traditional covert agents to avoid the limitations of Article 31(b)? The Gibson majority could have specifically held that persons involved in traditional undercover operations are exempted from Article 31(b). Traditional undercover operations referring to activities where the true identity and motive of the questioner is hidden, not just the true motive of the questioning, as is the case when the military leader practices deceit.

It would not be impossible to carve out a narrow exception to Article 31(b); in United States v. Jones[205] the Army court of military review decided that when there is a possibility of saving human life or avoiding serious injury and no other course of action is available other than questioning the suspect without warnings, an exception exists to the requirements of Article 31(b) and Miranda. The policy in favor of saving human life outweighs the accused's fifth amendment interest. Thus, precedence exists for carving out a narrow exception to Article 31(b).

In sum, the second condition of Duga-Gibson, in trying to exempt covert agents from the warning requirements, attributed an exceedingly narrow policy objective to Article 31(b): the neutralization of the subtle pressures in the military generated by rank and duty position. Although this was the original purpose for warning accused, it did not remain the exclusive

purpose. The Elston Act added the fifth amendment policy objective of ensuring that the accused generally knew what his rights were at the time of questioning, either by warnings or other means. Article 31(b) added the policy objective of warning a suspect or accused any time an interrogation seeking incriminating information takes place. Although this policy was grounded in the fifth amendment, it extended beyond the minimum constitutional protections. To say that warnings need only be given when coercion or unlawful influence is present, confuses the policy objectives of the common-law rule of confessions with those of the right against self-incrimination. Article 31 was a remarkable achievement because it brought together so many different legal principles. This fusion of multiple, complex legal principles is in large part responsible for the great difficulty military lawyers and judges have had in interpreting Article 31, specifically subsection (b).

Subsection 4: The Dohle Position of Authority test

In 1975, the Court of Military Appeals decided United States v. Dohle,[206] in which Private First Class Paul Dohle, U.S. Army, was convicted of larceny of four M16 rifles and 14 padlocks from his company arms room. When first discovered, investigators asked Dohle for consent to search his room. Investigators found the rifles in Dohle's room. They took Dohle back to the orderly room and advised him of his rights under

Article 31(b) and Miranda. He invoked his rights and no further interrogation took place. Sergeant Prosser was the unit armorer who first discovered the missing weapons and padlocks. He was also a friend of Dohle's.

> Prosser was detailed to guard [Dohle] while his transfer to confinement was being arranged. Without advising him of his rights, Prosser questioned Dohle about the theft because they were good friends and was confused and bewildered as to why anyone would want to take the rifles. [Dohle] stated in response to the questions that he had taken the rifles. It is this admission with which [the Court of Military Appeals was] concerned.[207]

Chief Judge Fletcher noted that Prosser believed "he was acting in a personal capacity, not professional [when he asked Dohle the questions]; he had not been directed to question [Dohle]; and he did not intend to use any admissions against him."[208] Chief Judge Fletcher acknowledged that previous decisions in this area "have analyzed the facts to determine if the interrogator was acting officially or solely with personal motives."[209] He believed, however, that this test was improper and declared that the "subjective nature of this inquiry requires a difficult factual determination, both at trial and appellate levels."[210] Chief Judge Fletcher believed that

> [w]here the questioner is in a position of authority [over the accused or suspect], we do not believe that an inquiry into his motives ensures that the protection granted an accused or suspect by Article 31 are observed....We must recognize that the position of the questioner, regardless of his motives, may be the moving factor in an accused's or suspects's decision to speak. It is the accused's or suspect's state of mind, then, not the questioner's, that is important.[211]

Based on this rationale, the Chief Judge announced a new test for determining who need to warn, purportedly overruling the numerous decisions requiring an element of officiality in the questioning before Article 31(b) warnings were required. He declared that

> where a person subject to the Code interrogates--questions--or requests a statement from an accused or suspect over whom the questioner has some position of authority of which the accused or suspect is aware, the accused or suspect must be advised in accordance with Article 31.[212]

Under this test, Article 31(b) warnings should have preceded Prosser's questioning of Dohle, and admission of the confession was erroneous. Judge Cook and Judge Ferguson concurred in the results, but not in

the rationale used by Chief Judge Fletcher.[213] Thus, a majority of the court did not endorse the test.

What policy did Chief Judge Fletcher try to implement? He did not want rank or duty position of a questioner to be the inducement for a confession. By requiring warnings whenever the questioner was in a position of authority over the suspect, the subtle, unspoken pressure to talk inherent in such relationships could be significantly reduced.

What were the strengths of this test? First, it sought to eliminate all situations where coercion might be felt in the mind of the suspect. The test shared one of the strengths of the Wilson literal-interpretation test, but without the negative side effect inherent in Wilson of providing excess protection to undeserving suspects. Under the Dohle test, questioners of equal or lower rank relative to the suspect could carry on a conversation with the suspect without having to warn him because there is no subtle pressure to talk based on rank disparity. Thus, the well intentioned questioner of equal or lower rank would not be subject to criminal liability under Article 98, because there was no violation of Article 31(b).

The most obvious strength of the Dohle test was its ease of application. The duty to warn turned on the objective determination of whether the questioner was in a position of authority over the suspect. The questioner could be in a position of authority over the

suspect in two ways: he held higher rank than the suspect or he held a law enforcement position. The second part of this test required the accused to be aware of the questioner's position of authority. The trial judge made an objective determination of the suspect's subjective perceptions. This test, however, was much easier to apply than the Duga-Gibson officiality plus perception test. Under the second condition of Duga-Gibson, the suspect had to perceive "that the inquiry involved more than a casual conversation" regardless of the questioner's position relative to the suspect. Thus, a superior could engage in what appeared to the suspect to be a casual conversation, and not have to give warnings, even if the superior's motive was to obtain incriminating information.

Under Dohle, the suspect must perceive "that the questioner has some position of authority over him." Therefore, regardless of how casual the superior made the conversation appear, he would still have to give warnings if the suspect was aware of the superior's rank or duty position.

What were the weaknesses of the position of authority test? Since the test turned on the questioner's rank or position, his motives were irrelevant. Thus, warnings were required in situations where the questioner acted in a governmental law-enforcement capacity, but also in situations where the questioner acted on personal or non-law-enforcement motives. The test required warnings in situations

where the suspect felt pressure to talk because of the questioner's rank or duty position, but also in situations where there was no pressure, despite the questioner's superior rank or duty position. Imagine a scenario where two suspects, an E-5 and an E-7, are simultaneously questioned by an E-6 friend and fellow platoon member without being advised of their rights. Under the Dohle test, the E-5's statement would be inadmissible, but the E-7's would be admissible, even though neither suspect felt any pressure to talk from their E-6 friend.

Another weakness of the Dohle test was that it created the potential for punishing the government through the exclusionary rule in situations where the government might not have been involved. What benefit is derived from punishing the government through exclusion of relevant evidence if there was no governmental questioning? There is no benefit. When the questioner is motivated by personal considerations, the fifth amendment does not apply, and it is counter-productive to excluded relevant evidence in those situations.[214]

Another weakness of the Dohle test was that when a military leader suspected a subordinate of a minor offense and wanted to counsel him for non-law-enforcement or disciplinary reasons, warnings would be required, possibly preventing the counseling, and at best chilling the discussion. In sum, Judge Fletcher tried to draw a bright line in an area of the law which

is incapable of being defined by easy bright line rules.

PART V

CONCLUSION

Who should be required to give Article 31(b) warnings? The answer to the question depends on which policy objective is held in the highest esteem. All four test have strengths because they each effectuate a legitimate policy objective. They all have weaknesses because they exclude some policy objectives. Like many other difficult legal issues, the key to answering the question is knowing where to strike the proper balance between the law-enforcement needs of the government, and the rights of the individual.

The Wilson literal-interpretation test granted the individual entirely too much protection. Statutes cannot anticipate every possible situation, therefore, judicial interpretation--not passivity--is necessary to fill the gap. A literal-interpretation of Article 31(b) ignored the reasonable necessities of law enforcement.

The second condition, or perception prong of the Duga-Gibson test, conditioned the rights warnings on

the perceptions of the suspect, even though the decision to warn belonged to the questioner. Not only was this illogical, but it disregarded the multiple policy objectives embraced by Article 31(b) to the detriment of individual service members and the armed forces. Thus, the Duga-Gibson test tips the scales too far in favor of law-enforcement officials.

The Dohle position of authority test attempted to find an easy answer for an extremely complex issue. The result was a test that required warnings in situations where they should not be required, and did not require warnings in situations where they should be required.[215] A bright line rule does not work well in an area of the law that has numerous legal principles interacting with each other simultaneously. A line is two dimensional; Article 31(b) has multiple dimensions.

In my opinion, Judge Latimer's officiality test requiring warnings when the questioner acts in an official law-enforcement capacity is the most meritorious test because it strikes the most equitable, reasonable balance between the needs of the government and the rights of the individual. The committee that drafted the Military Rules of Evidence "was of the opinion ... that both Rule 305(c) and Article 31(b) should be construed at a minimum, and in compliance with numerous cases, as requiring warnings by those personnel acting in an official disciplinary or law enforcement capacity."[216] Furthermore, I believe

the historical development of the right against self-incrimination and warning requirement in the military supports Judge Latimer's test more strongly than any of the other tests.

The officiality test recognizes that Article 31(b) grants an accused or suspect the right to be actually warned when a government agent seeks incriminating information. The officiality test does not permit an after-the-fact inquiry to ascertain if there really was any coercion, unlawful influence, or unlawful inducement perceived by the suspect or accused. Those are totally separate concerns that should be considered only if rights warnings were given. If rights warnings were not given, that should be the end of the inquiry, and the confession should be excluded.

What of the need for effective undercover operations? It is my opinion that a legislative change should be made which specifically exempts persons who are conducting an official undercover operation, managed by an official law-enforcement agency, targeting a suspect, from Article 31(b), so long as questioning is prior to any kind of restriction or preferral of charges of the suspect.[217] Less desirable than legislative action, but preferable to the second condition of Duga-Gibson, the Court of Military Appeals could satisfy the need for undercover operations by means of a narrow and specific exception for law-enforcement officers assigned to traditional undercover operations where the identity of the agent is hidden.

Informants who do not occupy a position of leadership relative to the suspect could likewise be exempted, since the ill-effects of deceit practiced by leaders would not occur in those situations.

It is difficult to predict where the Court of Military Appeals will go next in its quest to settle the question of who should warn under Article 31(b). The important point for the military criminal trial lawyer is that in view of the unsettled nature of the law, a well-reasoned and persuasive argument can be fashioned to support almost any position. To formulate the argument, an understanding of the historical development of the right against self-incrimination and the warning requirement, as well as the policy objectives of the different Court of Military Appeals tests, is necessary.

ENDNOTES

1. Uniform Code of Military Justice art. 31(b), 10 U.S.C. 831(b) (1982) [hereinafter UCMJ].

2. 2 C.M.A. 248, 8 C.M.R. 48 (1953).

3. See infra notes 113 - 175 and accompanying text.

4. United States v. Duga, 10 M.J. 206 (C.M.A. 1981). See infra notes 142 - 166 and accompanying text. The Duga test set out two conditions before Article 31(b) warnings are required: 1) the questioner must be acting in an official capacity, and 2) the suspect or accused must perceive the official nature of the questioning.

5. United States v. Jones, 24 M.J. 367, 369 (C.M.A. 1987) (Everett, C.J., concurring). Even though the Duga test has been used by the Court of Military Appeals since 1981, Chief Judge Everett said that a persuasive argument could be made against the first condition of the Duga test, but that "after further reflection, [he] believe[d] [Duga] to have been correctly decided." Id.

6. Mil. R. Evid. 305(c) analysis.

7. The United States Army experienced continuous legislative reforms in the law of confessions and right against self-incrimination from 1775 to 1951. By contrast, the United States Navy did not. The Navy's Articles for the Government of the Navy were copied in 1775 from the British Articles for the Government of the Royal Navy of 1649, as modified in 1749. The American Articles for the Government of the Navy "were slightly revised in 1800, and a few new wrinkles were added thereafter, but these rules stood virtually intact until the 1862 codification....[T]he Articles for the Government of the Navy (AGN) as they stood in 1950 were essentially unchanged from 1862." William T. Generous, Jr. Swords and Scales 10-11 (1973). Therefore, I will study the development of the right against self-incrimination and the common-law rule of confessions prior to the UCMJ as it occurred in the United States Army.

8. This discussion ends in 1951 as does the discussion in part III, infra, because the objective of these two parts is to provide insight into the state of the law at the time the Court of Military Appeals first decided the issue of who must warn under Article 31(b).

9. This article uses the term "law of confessions" to mean the general body of law that applies to the admission of a confession into evidence. Thus, various legal principles derived from different sources of authority, taken together form the "law of confessions." The specific legal principles discussed

in this article are the common-law rule of confessions, the fourteenth amendment's due process voluntariness standard, and the fifth amendment's right against self-incrimination.

10. This legal concept is interchangeably referred to as a "right" and as a "privilege". The term "right" implies something that belongs to the holder, whereas the term "privilege" implies something that the holder possess at the discretion of someone else. For the sake of clarity, this concept will be consistently referred to throughout the article as the "right" against self-incrimination.

11. 8 J. Wigmore, Evidence in Trials at Common Law, sec. 2251, at 295-318 (McNaughton rev. 1961) [hereinafter 8 Wigmore]. At least a dozen different policy objectives have been advanced as justification for the right against self-incrimination. One of the most persuasive is that it "contributes toward a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load." Id. at 317.

12. 3 Wigmore, Evidence in Trials at Common Law, sec. 822, at 329-336 (Chadbourn rev. 1970) [hereinafter 3 Wigmore]. The policy objective of the common-law rule of confessions was this: "The principle ... upon which

a confession may be excluded is that it is, under certain condition, testimonially untrustworthy." Id. at 330 (emphasis added). Throughout this article, the term "common-law rule of confessions" refers to this rule based exclusively on the narrow policy objective of admitting only "trustworthy evidence."

13. Ullmann v. Unites States, 350 U.S. 442, 438 (1956) (quoting New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (quoted in Stephen A. Saltzburg, American Criminal Procedure 366 (1980).

14. 8 Wigmore, supra note 11, sec. 2250, at 267 - 295.

15. Id.

16. Id.

17. The oath ex officio was so named because it was administered by an official of the court by virtue and authority of his office. Congressional Research Service, Library of Congress, The Constitution of the United States of America, S. Doc. No. 82, 92d Cong., 2d Sess. 1106 (1972) [hereinafter Constitution of the United States].

18. Id.

19. Id. at 316.

20. American Bar Foundation, Sources of Our Liberties 129 - 132 (R. Perry ed. 1959) [hereinafter Liberties].

21. Id. at 132.

22. Id. at 428.

23. Id. at 134, 136.

24. Constitution of the United States, supra note 17, at 1106. The six states were Massachusetts, New Hampshire, North Carolina, Pennsylvania, Vermont and Virginia.

25. U.S. Const. amend. V. The fifth amendment states in pertinent part that "[n]o person shall ... be compelled in any criminal case to be a witness against himself ..." Id.

26. Liberties, supra note 20, at 418.

27. See infra notes 32 - 37, 59 - 60 and accompanying text.

28. See infra notes 32-33 and accompanying text. Throughout the remainder of this article, the term "confession," unless otherwise indicated, refers to out-of-court, pre-trial incriminating statements by a person suspected or accused of a crime. The term "confession" does not refer to a judicial confessions, or a pleas of guilty.

29. 8 Wigmore, supra note 11, sec. 2269, at 412 - 413.

30. See infra notes 25 - 48 and accompanying text.

31. See Hopt v. Utah, 110 U.S. 574 (1884).

32. 168 U.S. 532 (1897).

33. Id. at 542.

34. Bram was a murder case which arose on an American ship on the high seas, and thus was adjudicated in the federal criminal justice system.

35. Constitution of the United States, supra note 17, at 1122.

36. Powers v. United States, 223 U.S. 303, 313 (1912); Burdequ v. McDowell, 256 U.S. 465, 475 (1921); Ziang Sun Wan v. United States, 266 U.S. 1, 14-15 (1924); Shotwell Mfg. Co. v. United States, 371 U.S. 341, 347 (1963).

37. 384 U.S. 436, 461-462 (1966).

38. See supra notes 29 - 37 and accompanying text.

39. 3 Wigmore, supra note 12, sec. 817, at 291 - 292.

40. Professor Wigmore's views were important to the development of military evidence law not just because of his general influence on American evidence law, but also because of his special impact on military evidence law. Professor Wigmore served on active duty with the United States Army from 1917 to 1920. He wrote the chapter on evidence in the 1917 Manual for Courts-Martial and later expanded it in the 1921 Manual for Courts-Martial. The Army Lawyer: A History of the Judge Advocate General's Corps, 1775 -- 1975, 119 (1975).

41. 3 Wigmore, supra note 12, sec. 818, at 294. "[U]p to the middle of the 1600s at least, the use of torture to extract confessions was common, and that confessions so obtained were employed evidentially without scruple." Id.

42. Id. at sec. 819, at 296 - 297.

43. Id. sec. 816, at 290 - 291.

44. Id.

45. Id. sec. 819, at 297.

46. Id.

47. Id.

48. Id. sec. 820, at 297.

49. Id. sec. 820a, at 298 - 301.

50. Id. at 299.

51. Id.

52. Id. at 300.

53. Id.

54. Id. at 300 - 301.

55. Id. sec. 820d, at 306 - 308.

56. Id. sec. 822, at 329 - 330.

57. 110 U.S. 574 (1884).

58. Id. at 585.

59. 168 U.S. 532 (1897); See supra notes 32 - 37 and accompanying text.

60. See supra notes 34 - 37.

61. 3 Wigmore, supra, note 12, sec. 822, at 329 - 336.

62. McCormick, The Scope of Privilege in the Law of Evidence, 16 Texas L. Rev. 447 (1938).

63. 297 U.S. 278 (1936).

64. Id. at 281 - 282.

65. Id. at 285, 286 (emphasis added).

66. 309 U.S. 227 (1940).

67. 314 U.S. 219 (1941).

68. Id. at 236 (emphasis added).

69. Constitution of the United States, supra note 24, at 1130 (emphasis added).

70. Ashcraft v. Tennessee, 322 U.S. 143 (1944); Watts v. Indiana, 338 U.S. 49 (1949); Blackburn v. Alabama, 361 U.S. 199 (1960); Rogers v. Richmond, 365 U.S. 534 (1961); Haynes v. Washington, 373 U.S. 503 (1963).

71. In Rogers v. Richmond, 365 U.S. 534, 540-541 (1961), ten years after enactment of the UCMJ, the Supreme court declared that

> [t]o be sure, confessions cruelly extorted may be and may have been, to an unascertain extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence

left little doubt of the truth of what the defendant had confessed.

72. See Watts v. Indiana, 338 U.S. 49 (1949); Turner v.Pennsylvania, 338 U.S. 62 (1949); Harris v. South Carolina, 338 U.S. 68 (1949).

73. Fed. R. of Crim. P. 5(a) (1946).

74. Fed. R. of Crim. P. 5(b) (1946). The magistrate also had to set the terms for bail. Id.

75. 318 U.S. 332 (1943).

76. Constitution of the United States, supra note 24, at 1125 n. 14.

77. 335 U.S. 410 (1948).

78. Federal law enforcement officials had to follow the due process requirements of the fifth amendment, rather than the fourteenth amendment due process clause, which applied to state law enforcement officials.

79. See, e.g., Burns v. Wilson, 346 U.S. 137, 145 n. 12 (1953).

80. W. Winthrop, Military Law and Precedents 953 - 960 (2d ed. 1920) [hereinafter Winthrop].

81. Id. at 931-946.

82. 96 Cong. Rec. S Pt. 1, 1354 (1950), reprinted in Congressional Floor Debate on the Uniform Code of Military Justice 9 ND-p-1978, Navy JAG, at 189 (emphasis added).

83. Winthrop, supra note 80, at 968.

84. Id. at 982.

85. Id. (emphasis added).

86. Winthrop uses the term "prisoner" synonymously with the term "accused." Id. at 196 - 199.

87. Winthrop, supra note 80, at 982.

88. Id. at 976 - 985.

89. Act of March 16, 1878, ch. 37, 20 Stat. 30.

90. Id.

91. 149 U.S. 60, 65 (1893).

92. Id. at 65. The Supreme Court said that to allow the prosecution to comment on the accused's decision to invoke his right against self-incrimination disregarded the accused's presumption of innocence.

93. A. Murray, Instructions for Courts-Martial (2d ed. 1891).

94. Id. at 9.

95. Id. at 10 (emphasis added).

96. The Instructions did not contain a similar admonition concerning officer accused.

97. The common-law rule of confessions was applicable only to the enlisted accused, while the right against self-incrimination was applicable to all accused. This highlights the difference between the policy of the common-law rule of confessions and the policy underlying the right against self-incrimination. The former is not intended to protect the accused, it is intended to protect the fact-finding process by

excluding unreliable evidence, in this case an unreliable judicial confession. The latter is a personal right, intended to protect the thought process of the accused from government probing.

There is no definitive answer for the different treatment of enlisted and officers, but it can be reasonably assumed that in 1891, an enlisted accused was much more likely to be ignorant of his rights and of the criminal process than an officer accused. This made the enlisted accused more susceptible to inducement from the judge advocate and others, to admit to something which was not true. The added precaution before receiving a judicial confession from an enlisted accused was probably intended to reduce the higher risk of false pleas of guilty, as compared to the officer accused.

98. Act of March 2, 1901, ch. 809, 1, 31 Stat. 951 [hereinafter Act of 1901].

99. Lederer, Rights Warning in the Armed Services, 72 Mil. L. Rev. 1, 3 n.11 (1976) (quoting Act of 1901).

100. Id.

101. This non-constitutional protection attached itself to the right against self-incrimination. It continued its attachment to the right, and today is embodied in Article 31(c), UCMJ.

102. See infra notes 74 - 86 and accompanying text.

103. A Manual for Courts-Martial, Courts of Inquiry, and Retiring Boards, and of Other Procedures Under Military Law, rev. ed. 1905 [hereinafter MCM, 1905].

104. Id. at 44.

105. The complete change from the ICM, 1891 to the MCM 1905 follows. The words within the brackets were in the ICM, 1891, but not in the 1905 Manual for Courts-Martial. The judge advocate "may ask a prisoner how he intends to plead; but, when the accused is an enlisted man, he should, in no case, try to induce him to plead guilty, or leave him to infer that, if he does so, his punishment will be lighter. [When, however, such a plea is voluntary and intelligently made the judge advocate should properly advise the prisoner of his right to offer evidence in explanation of his offense....] MCM, 1905 at 23.

106. MCM, 1905 at 44.

107. Id. at 23 - 24.

108. Act of August 29, 1916, 39 Stat. 619 (1916) [hereinafter Articles of War, 1916].

109. Id. art. 24 (emphasis added).

110. Hearings on S. 3191 Before the Subcomm. on Military Affairs of the Senate Comm. on Military Affairs, 64th Cong., 1st Sess. (1916), printed in S. Rep. No. 130, 64th Cong., 1st Sess. 53 (1916).

111. The enactment of the American Articles of War of 1806 granted courts of inquiry "the same power to summon witnesses as a court-martial, and to examine them under oath." Article of War 91, Winthrop, supra note 80, at 984. Article 118 of the 1874 Articles of War retained the same power for courts of inquiry. Id. at 995. Finally, the 1905 MCM not only referenced Article of War 118 and the power of the court of inquiry to summon and swear witnesses, it also declared that retiring boards "shall have such powers of a court-martial and court of inquiry" for purposes of conducting an inquiry. MCM 1905, supra note 103, at 83 - 84, 87.

112. A Manual for Courts-Martial, United States Army, 1917 [hereinafter MCM, 1917].

113. Id. para. 233.

114. Id. para. 225.

115. MCM 1917, para. 225, defined a confession as voluntary "when it is not induced or materially influenced by hope of release or other benefit or fear of punishment or injury inspired by one in authority, or, more specifically, where it is not induced or influenced by words or acts, such as promises, assurances, threats, harsh treatment, or the like, on the part of an official or other person competent to effectuate what is promised, threaten, etc., ..."

116. Id.

117. Id. (emphasis added).

118. Id. (emphasis added).

119. Id. (emphasis added).

120. Id.

121. Id. (emphasis added).

122. Act of June 4, 1920, ch. 227, 41 Stat. 792.

123. See supra note 109 and accompanying text. The original forums mentioned originally in Article of War 24 were courts-martial, commissions, courts of inquiry,

and boards.

124. See Lederer, supra note 99, at 4.

125. Articles of War, 1916 art. 114.

126. Manual for Courts-Martial, United States Army, 1921.

127. The complete modifications to the portion of paragraph 225(b) which contained the warning requirement is shown below. The words in regular typeface were unchanged from the MCM, 1917, paragraph 225(b). In 1921, the words in bold typeface were added, and the words within brackets were deleted:

Where the confession was made to a civilian in authority, such as a police officer making an arrest, the fact that the official did not warn the person that he need not say anything to incriminate himself does not necessarily in itself prevent the confession from being voluntary. But where the confession is made to a military superior the case is different. Considering [however,] the relation that exists between officers and enlisted men and between an investigating officer and a person whose conduct is being investigated, [and the obligation devolving] **it devolves** upon an investigating officer or other military superior, to warn the person investigated that he need not answer

any question that might tend to incriminate him. Hence, confessions made by soldiers to officers or by persons under investigation to investigating officers should not be received unless it is shown that the accused was warned that his confession might be used against him or it is shown clearly in some other manner that the confession was entirely voluntary.

128. Act of June 24, 1948, ch. 625, 214, 41 Stat. 792. The Act was known as the Elston Act because of Ohio Representative Elston's leadership in the enactment of this statute.

129. Id. art. 24 (emphasis added).

130. See Lederer, supra note 99, at 5.

131. Hearings on H.R. 2575 Before a Subcomm. of the House Comm. on Armed Services, 80th Cong., 1st Sess. 2044 (1947) (emphasis added).

132. Id. at 2045.

133. Id.

134. Under the MCM 1921, para. 226, admissions were treated differently from confessions, which were under paragraph 225. Paragraph 226, entitled "Admissions Against Interest," demonstrated that the law of confessions was the only rule applicable to extra-judicial statements in the army. It stated that "[s]omewhat connected with the subject of confessions is that of declarations or admissions against ones's own interest. This constitutes another exception to the rule excluding hearsay." Admissions fell short of a full confession, but they were important to connect the accused to the offense. The rule was that admissions were generally admissable. In other words, there was a vast difference in the evidentiary rules between confessions and admissions, even though the effect on the outcome of the trial was very similar.

135. Manual for Courts-Martial, United States Army, 1949, 127 (emphasis added) [hereinafter MCM, 1949].

136. UCMJ, art. 31.

137. Of course, all previous developments in the right against self-incrimination and warning requirements discussed to this point occurred in the Army. The UCMJ applied the reforms previously made in the Army, and the new reforms created by the UCMJ, to all the military services.

138. Manual for Courts-Martial, United States, 1951 140a. Paragraph 140a lists some examples of coercion, unlawful influence, and unlawful inducement in obtaining a confession or admission as:

(1) Infliction of bodily harm.

(2) Threats of bodily harm.

(3) Imposition of confinement or deprivation of privileges.

(4) Promises of immunity or clemency.

(5) Promises of reward or benefit, of a substantial nature, likely to induce a confession or admission.

(6) During an official investigation (formal or informal) in which the accused is a person accused or suspected of the offense, obtaining the statement by interrogation or request without giving a preliminary warning of the right against self-incrimination--except when the accused was aware of that right and the statement was not obtained in violation of Article 31b (for example, if the interrogators were civilian or foreign police).

(7) Obtaining the statement in violation of Article 31.

This list is identical to the list contained in

paragraph 127, MCM, 1949, with the exception of numbers 6 and 7, which were added in 1951. This reflects the intent to make the warning requirements in Article 31(b) absolute. In other words, a failure to warn made the confession per se involuntary.

139. See supra notes 131 - 133 and accompanying text.

140. Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 984, 985 (1949) (emphasis added) [hereinafter UCMJ Hearings].

141. Id. at 986 (emphasis added).

142. Under Article 24, the protection against self-incrimination and self-degradation were limited to the traditional forums. Under Article 31(a), the constitutionally based protection against self-incrimination expanded beyond the traditional forums. The common-law based protection against self-degradation remained confined to military tribunals. This is circumstantial evidence that Congress intended Article 31(a) to be interpreted broadly.

143. See supra notes 137 - 141 and accompanying text.

144. See UCMJ Hearings, supra note 140, at 983.

145. Id. at 755. Proposed Article 31 (numbered 30 when initially proposed) lacked the words "coercion" and "unlawful influence" found in Articles of War, 1948, art. 24, substituting therefore the words "unlawful inducement." Colonel John P. Oliver, JAG, Reserve, Legislative Counsel of the Reserve Officer's Association of the United States, testified before the House subcommittee, that he felt uncomfortable with deletion of the words from the law. He said that "we feel that the term 'any unlawful inducement' should be defined. We can find nothing in the proposed military justice code that would indicate what may or may not compose unlawful inducement. We believe that the present article of war 24 presently used by the Army and Air Force should be inserted in place of subparagraph (d)."

146. The use of any of the five means for violating the right was intended to result in two consequences: 1) criminal liability and 2) exclusion of evidence from use at courts-martial. This was a two-prong attack on individual violators of the right against self-incrimination, and on the law enforcement system if it could not ensure proper conduct by its officers.

147. Uniform Code of Military Justice, Text, References and Commentary based on the Report of the Committee on a Uniform Code of Military Justice to the Secretary of Defense 47 (1950).

148. The specific chapter number was 22; the original citation to the UCMJ was Title 50 U.S.C. (Chap. 22) 551-736.

149. UCMJ art. 2.

150. See UCMJ Hearings supra note 140, at 991 - 992.

151. See, e.g., United States v. Grisham, 4 C.M.A. 694, 16 C.M.R. 268 (1954).

152. Id. at 696, 16 C.M.R. at 270.

153. Mil. R. Evid. 305(b)(1) and 305(h).

154. Mil. R. Evid. 305(b)(2).

155. See, e.g., Brewer v. Williams, 430 U.S. 387, 399 - 400 (1977).

156. See, e.g., United States v. Creamer, 1 C.M.A. 267, 273, 3 C.M.R. 1, 7 (1952); see also Mil. R. Evid. 305(c) analysis.

157. See Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 307(b) [hereinafter R.C.M. 307(b)]. R.C.M. 307(b) specifies how charges are preferred by an accuser against a person subject to the Code, thereby transforming a person subject to the Code into an "accused" person.

158. See, e.g., United States v. Leiffer, 13 M.J. 337 (C.M.A. 1982).

159. 2 C.M.A. 248, 8 C.M.R. 48 (1953).

160. Id. at 254, 8 C.M.R. at 54.

161. Id.

162. Id. at 255, 8 C.M.R. at 55.

163. Id. (emphasis added).

164. Id.

165. Id. (emphasis added).

166. See infra note 147 and accompanying text.

167. United States v. Wilson, 2 C.M.A. at 260, 8 C.M.R. at 60 (Latimer, J., dissenting).

168. Id. at 261, 8 C.M.R. at 61.

169. Id.

170. That Article 98 has not yet been used to prosecuted anyone successfully for a violation of Article 31(b) is possibly due in part to the fact that the officiality condition has been required by the Court of Military Appeals for most of the UCMJ's existence. See infra notes 172 - 206 and accompanying text.

171. See UCMJ Hearings supra note 140, at 986.

172. Maguire, The Warning Requirement of Article 31(b): Who Must Do What to Whom and When?, 2 Mil. L. Rev. 1, 8 (1958).

173. Id.

174. See, e.g., United States v. Fisher, 11 C.M.R. 325 (A.B.R. 1953), rev'd on other grounds, 15 C.M.R. 152 (1954); United States v. Murray, 12 C.M.R. 794 (A.F.B.R. 1954).

175. See, e.g., United States v. Cox, 13 C.M.R. 414 (A.B.R. 1953).

176. See, e.g., United States v. Taylor, 10 C.M.R. 669 (A.F.B.R. 1953).

177. 11 C.M.R. 521 (A.B.R. 1953), pet. denied, 3 C.M.A. 839, 13 C.M.R. 142 (1953).

178. 13 C.M.R. 261 (A.B.R. 1953), pet. denied, 3 C.M.A. 846, 14 C.M.R. 228 (1954).

179. Maguire, supra note 172, at 8. Maguire states that "[t]he decisions of the boards of review indicate their awareness of this distinction," meaning the distinction between a person acting in an official capacity and one acting in an official law-enforcement investigative capacity. Id.

180. See supra note 168 and accompanying text.

181. 10 M.J. 206 (C.M.A. 1981).

182. Although the Duga test uses only the words "official capacity" and not "official law-enforcement capacity," it is clear from the rationale used in the Duga decision that "official law enforcement capacity"

is what was meant. Specifically, Duga admits that it relies exclusively on the rationale of United States v. Gibson, 3 C.M.A. 746, 14 C.M.R. 164 (1954). The first condition of Gibson was based on Judge Latimer's officiality condition, which carried with it the law enforcement modifier. Furthermore, the cases subsequent to Gibson and Duga both recognized the difference between a person acting in discharge of an official duty, and one acting in discharge of an official law-enforcement duty. Only the latter had to warn under Article 31(b).

183. 3 C.M.A. 746, 14 C.M.R. 164 (1954).

184. Id. at 750, 14 C.M.R. at 168.

185. Id. at 753, 14 C.M.R. at 171. "There remains to be considered, then, only whether the deceit practiced by Ferguson and the agents of the Division in concealing Ferguson's official position requires the exclusion of the statement." (emphasis added).

186. Id. at 752, 14 C.M.R. at 170.

187. Id. at 753, 14 C.M.R. at 171.

188. Id. at 754, 14 C.M.R. at 172.

189. United States v. Duga, 10 M.J. 206, 207 (C.M.A. 1981).

190. Id.

191. See supra note 182 and accompanying text.

192. Id. at 210.

193. Id. at 211.

194. Id.

195. Id. at 208, 209.

196. See supra notes 168 - 169 and accompanying text.

197. See supra notes 169 - 173 and accompanying text.

198. To put things in proper perspective, although the Duga-Gibson test contains two conditions that must be met for there to be a warning requirement, the second condition has rarely been the determinative factor. The majority of cases have rested on findings that the questioner was not acting in an official law enforcement capacity; thus, the military courts often

do not discuss the second condition.

199. See, e.g., United States v. Gibson, 3 C.M.A. 746, 758, 14 C.M.R. 146, 176 (1954).

200. See supra note 121 and accompanying text.

201. MCM, 1917, para. 225.

202. 384 U.S. 436 (1966).

203. Id. at 468, 469.

204. Miranda v. Arizona, 384 U.S. at 469.

205. 19 M.J. 961 (A.C.M.R.), pet. granted, 20 M.J. 393 (C.M.A. 1985).

206. 1 M.J. 223 (C.M.A. 1975).

207. Id. at 224.

208. Id. at 224, 225.

209. Id. at 225.

210. Id.

211. Id. (emphasis added).

212. Id. (emphasis added).

213. Id.

214. See supra notes 169 - 170 and accompanying text.

215. Examples: An E-6 victim of a larceny who asks the E-5 suspect questions out of a desire to recover his stolen property should not be required to give warnings, but Dohle would require warnings. An E-5 who questions his friend who is suspected of a crime (also an E-5) at the request of law-enforcement officials should be required to give warnings because he is representing the United States in an official law-enforcement investigation, yet Dohle would not require warnings.

216. Mil. R. Evid. 305(c) analysis (emphasis added).

217. See Mil. R. Evid. 305(d)(1)(B) analysis. In the military, an accused or suspect must be advised of his rights to counsel prior to questioning, whether open or surreptitious, if the questioning takes place after

preferral of charges or imposition of pretrial arrest, restriction, or confinement. Id.